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CHARLES

No. 804

In the Supreme Court of the United States

OCTOBER TERM, 1939

SUNSHINE ANTHRACITE COAL CO., APPELLANT

v.

HOMER M. ADKINS, AS COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF ARKANSAS

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS

BRIEF FOR THE APPELLEE

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OPINIONS BELOW

The final opinion of the District Court (R. 40–44) has not yet been reported. The opinion of the District Court denying appellant's motion to strike a portion of appellee's answer (R. 32–39) is reported in 31 F. Supp. 125. The opinion of the Circuit Court of Appeals for the Eighth Circuit in *Sunshine Anthracite Coal Co.* v. *National Bituminous Coal Commission* is reported in 105 F. (2d) 559, certiorari denied November 6, 1939, *sub nom. Sunshine Anthracite Coal Co.* v. *Ickes,* No. 410, October Term, 1939, rehearing denied December 4,

1939. This opinion may be found in the record in No. 410 (pp. 378–401), which is Volume II of the present record.[1]

JURISDICTION

The judgment below was entered February 16, 1940 (R. 50). The order allowing appeal was filed March 4, 1940 (R. 119), and probable jurisdiction noted by this Court March 25, 1940. Jurisdiction of this Court rests on Section 3 of the Act of August 24, 1937, c. 754, 50 Stat. 752; 28 U. S. C. Supp. V, Sec. 380a.

QUESTIONS PRESENTED

1. Whether the regulatory and taxing provisions of the Bituminous Coal Act are constitutional.

2. Whether the tax imposed by Section 3 (b) of the Act applies to producers who are not members of the Bituminous Coal Code.

3. Whether the trial court erred in holding that in view of the decision of the Circuit Court of Appeals in *Sunshine Anthracite Coal Co.* v. *National Bituminous Coal Commission*, appellant could not raise the question of whether its coal was bituminous coal within the meaning of the Act.

STATUTE INVOLVED

The statute involved is the Bituminous Coal Act of 1937 (c. 127, 50 Stat. 72–91, 15 U. S. C. Supp. V, Secs. 828–851). The Act is attached at the end of this brief.

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[1] References to the record in No. 410 will be in the following form: "Vol. II, R. 378."

STATEMENT

Appellant operates a coal mine in the Spadra Field, Johnson County, Arkansas (R. 4). Almost all of the coal it produces is sold to purchasers outside the State of Arkansas (R. 114).

The Bituminous Coal Act imposes a tax of one cent per ton upon the sale or disposal of bituminous coal produced within the United States (Section 3 (a)),[2] and an additional tax of 19½ percent of the sales price on coal sold by producers who are not members of the Bituminous Coal Code (Section 3 (b)).[3] Appellant has not accepted membership in the Code (R. 3). Appellant has paid the one cent tax, but has failed and refused to pay the 19½ percent tax (R. 106). On May 3, 1938, appellee, the Collector of Internal Revenue for the District of Arkansas, demanded that appellant pay $14,749 taxes, penalties, and interest accruing under Section 3 (b) of the Act for the period ending February 1938, and on May 5 appellee filed a notice of tax lien against appellant's property for $15,487.12 (R. 106).

On May 9, 1938, appellant filed its complaint in this suit (R. 1). The complaint alleged that it was

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[2] These provisions, originally contained in Section 3 of the Bituminous Coal Act, are now found in Section 3520 of the Internal Revenue Code. For purposes of convenience, the references in this brief will be to the sections in the Bituminous Coal Act.

[3] Appellant claims that the 19½% tax does not apply to noncode members. See p. 39, *infra*.

impossible for appellant to pay the tax imposed by Section 3 (b) of the Coal Act and that any attempt to pay said tax would result in the destruction of appellant's business, that the 19½-percent tax was in truth a penalty and not a tax, that the coal produced by appellant was not bituminous coal within the meaning of the statutory definition but semi-anthracite coal and that accordingly appellant was not subject to the statute, and that the Act was unconstitutional for a number of reasons (R. 1–20). The complaint was subsequently amended to allege that the 19½-percent tax was only applicable to code members and that accordingly appellant was exempt therefrom (R. 30–31). Appellant sought temporary and permanent injunctions against any steps by the appellee to collect the 19½-percent tax from it (R. 20). A three-judge court was convened, and on June 3, 1938, a temporary injunction was granted (R. 26–27). Such an injunction is still in effect (R. 51).

Before any of the above steps had been taken, proceedings had been instituted before the National Bituminous Coal Commission[1] to determine

[1] Since July 1, 1939, the functions of the Commission have been administered by the Bituminous Coal Division of the Department of the Interior. Reorganization Plan No. II, submitted by the President to Congress May 9, 1939, Section 4 (b); Pub. Res. No. 20, 76th Cong., 1st Sess., c. 193, approved June 7, 1939. In this brief, reference will generally be made to the National Bituminous Coal Commission rather than to the Bituminous Coal Division of the Department of the Interior.

whether appellant's coal was subject to the Act. On July 27, 1937, the Commission had established a procedure whereby coal producers could obtain a determination as to the status of their coal (Vol. II, R. 1–3), and on August 31, 1937, appellant filed with the Commission an application for exemption (Vol. II, R. 4A–4F). On September 24, 1937, the Commission ordered that a public hearing be held in Arkansas both on appellant's application for exemption and for the purpose of determining the status of coals in Arkansas generally (Vol. II, R. 5–6).

The hearing was held before an examiner on October 4, 5, and 6, 1937 (Vol. II, R. 79). Petitioner introduced evidence to the effect that coal from the Spadra field has been advertised and sold as "Arkansas anthracite" (Vol. II, R. 85); and that by certain methods of classifying coal by rank on the basis of chemical analysis, particularly that of the American Society for Testing Materials,[5] petitioner's coal was semianthracite (Vol. II, R. 104). Considerable evidence was introduced in opposition to show that petitioner's coal and Spadra coal were regarded by the industry and were classified under other scientific tests as semibituminous, a

[5] There was evidence that the American Society for Testing Materials, which is an organization without official status, issued certain standards as tentative in the year 1934; such standards have been changed in certain respects from year to year until the present standards were adopted in 1937, after passage of the Bituminous Coal Act of 1937 (Vol. II, R. 298–299).

high-grade bituminous coal, and resembled bituminous coal rather than Pennsylvania anthracite in physical characteristics, color of flame, methods of mining, wage scales, and competitive position in the market (Vol. II, R. 209, 215–8, 250–8, 296–8, 343–5, 359, 430–4).

On August 31, 1938, after the issuance of an examiner's report (Vol. II, R. 37), and a proposed report by the Commission (Vol. II, R. 40–45), the filing of exceptions to the proposed report (Vol. II, R. 47–51), and oral argument before the Commission, the Commission filed an opinion and order denying the application for exemption and declaring that all coal produced in certain counties in Arkansas was bituminous within the meaning of the Act (Vol. II, R. 52–65, 66–68).

On October 10, 1938, appellant filed in the Circuit Court of Appeals for the Eighth Circuit a petition to review this order, pursuant to Sections 4–A and 6 of the Coal Act (Vol. II, R. 360–363). Appellant's main contentions were that the Commission had no jurisdiction under the statute to determine what coal was subject to the Act, and that in any event the Commission's order was not supported by substantial evidence (Vol. II, R. 362–363). The case was argued before the Circuit Court of Appeals on March 14, 1939 (Vol. II, R. 377). On June 19, 1939, that court handed down an opinion affirming the Commission's decision (Vol. II, R. 378–402). On July 8, 1939, a petition for rehearing was denied (Vol. II, R. 412). The Cir-

cuit Court of Appeals held that the Commission's jurisdiction to determine the status of coal claimed to be exempt from the Act rested on two separate and distinct statutory bases: (a) the general power of the Commission to make reasonable rules and regulations for the carrying out of the provisions of the Act (Section 2 (a)), and (b) the power to pass upon applications for exemption under Section 4–A (Vol. II, R. 381–388). After reviewing the evidence at length the Court also concluded that the Commission's decision was based on substantial evidence (Vol. II, R. 390–399).

A petition for certiorari was filed in this Court on September 23, 1939, the questions presented in the petition being the same as those raised before the Circuit Court of Appeals. On November 6, 1939, this Court denied the petition, and on December 4 denied a petition for rehearing.

The above proceedings were described in the appellee's answer in this case, which answer was supplemented in order to bring before the court matters occurring after the original answer was filed (R. 21–26, 27–28). When the District Court in this case was apprised of the fact that appellant had also filed a petition in the Circuit Court of Appeals with respect to some of the same questions, it postponed the trial of this case until such time as the proceeding in the Circuit Court of Appeals might be concluded. After the final action of this Court in that proceeding, on December 4, 1939, the three-judge court was again convened, on Decem-

ber 22, to pass upon a motion by appellant to strike those portions of appellee's answer which described the proceeding before the Commission and the Circuit Court of Appeals and asserted that they were a bar to redetermination of the status of appellant's coal in the District Court (R. 28–29).[6] On January 8, 1940, the District Court handed down an opinion denying the motion to strike (R. 32–39). The Court held that the decision of the Circuit Court of Appeals was conclusive on the question of whether appellant's coal was subject to the Act and that it would not hear evidence on that issue *de novo* (R. 39). Appellant was left free to litigate at the trial other questions raised in the complaint.

The case was tried on February 15, 1940. Evidence was introduced by appellant to support its allegations that it was financially unable to pay the 19½-percent tax (R. 52–61). Appellant sought to introduce evidence that its coal was not bituminous, but such evidence was excluded by the court in accordance with its prior ruling (R. 71–72).[7] Ap-

[6] The question was presented in this manner so that the parties might know in advance of trial whether the Court would hear evidence with respect to the nature of appellant's coal.

[7] Although excluded, this evidence was offered for the record and may be found at R. 71–112.

In view of the court's ruling, the Government did not offer or introduce evidence in opposition to that submitted by appellant. Thus this record only contains evidence on one side of the question. The evidence offered by appellant

pellee introduced into evidence a certified copy of the transcript of the record of this Court in *Sunshine Anthracite Coal Co.* v. *Ickes*, No. 410, this Term, which contained the entire record of the proceedings before the Commission and the Circuit Court of Appeals.[8] Appellee also offered a stipulation of the parties stating that practically all of appellant's coal was sold in interstate commerce and reciting in summary form a description of conditions in the bituminous coal industry[9] (R. 113-118). Appellee did not attempt to meet appellant's evidence as to irreparable injury or "extraordinary circumstances" (cf. *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498). On the contrary, the Government expressly waived "its objections to the equitable jurisdiction of the court and * * * its defense under Section 3224 of the Revised Statutes" (R. 118).

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did not differ in kind from that which had been introduced before the National Bituminous Coal Commission; it was merely cumulative testimony along the same lines as that of one of the witnesses before the Commission (Vol. II, R. 287-324). The opinion of the Circuit Court of Appeals analyzes this type of testimony and the weight to be given it in some detail (Vol. II, R. 394-399, 401).

[8] Although the record in No. 410 is a part of this record, it has not been reprinted and is before this Court in its original form, as Vol. II.

[9] The language of the stipulation is substantially the same as that of the opinion of Mr. Justice Adkins in *Carter* v. *Carter Coal Co.*, 63 Washington Law Reporter 986 (Sup. Ct., D. C.).

On February 16, 1940, the District Court filed findings of fact and conclusions of law (R. 44–50) and rendered an opinion (R. 40–44). The court concluded that it had jurisdiction as a court of equity (R. 49). It reaffirmed its prior ruling that it had no jurisdiction to determine whether appellant's coal was subject to the statute and that the decision of the Circuit Court of Appeals was binding upon it (R. 49). The court held the Act to be a valid exercise of the commerce power, not violative of the Fifth Amendment, and not containing an invalid delegation of legislative power, following *City of Atlanta* v. *National Bituminous Coal Commission*, 26 F. Supp. 606 (D. D. C.), affirmed by this Court on another ground, No. 32, this Term (R. 40). The Court held that the 19½-percent tax applied to producers who did not subscribe to the Bituminous Coal Code, that the tax was valid as effecting the valid regulatory purpose of the Act. and that the Act did not contain an improper classification by reason of the fact that this tax applied only to producers who were not members of the Code (R. 49–50).

Although the Court ordered the bill dismissed on the merits, it granted appellant a permanent injunction against collection of taxes accruing prior to December 4, 1939, the date on which this Court finally disposed of the earlier litigation[10] (R. 50–

[10] Section 4–A of the Coal Act protects persons filing applications for exemption from any liability until the Com-

51). The Government has not appealed from this part of the decree. The Court also granted a stay with respect to taxes accruing after December 4, pending final disposition of this appeal (R. 51).

SUMMARY OF ARGUMENT

I

A. The price-fixing provisions of the Bituminous Coal Act of 1937 are in substance the same as those contained in the Bituminous Coal Conservation Act of 1935. Although the majority of the Court in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, did not pass upon the validity of these provisions, the dissenting opinions indicated that they were valid.

B. Since the regulatory provisions of the Act apply only to sales in or directly affecting interstate commerce, they are a valid exercise of the federal commerce power. *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533.

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mission has acted upon the application. At the trial, the Government conceded that since the Commission had jurisdiction of appellant's application for exemption under this section, as the Circuit Court of Appeals had held, appellant would not be liable for the taxes imposed under Section 3 (b) of the Act for the period ending with the Commission's decision on August 31, 1938. The Court held that it had power to, and in view of the equities of the case that it should, extend the period of nonliability so as to include the period during which the Commission's determination was being reviewed in the courts, that is from August 31, 1938, to December 4, 1939 (R. 43–44). Since the Government has not appealed from this ruling, the questions which it raises need not be considered.

C. Statutes fixing prices do not violate the due process clause. *Mayo* v. *Lakeland Highlands Canning Co.*, No. 270, this Term. Even if conditions in an industry be deemed material, the burden of proving that the regulation is arbitrary or capricious and of overcoming the presumption of constitutionality is upon the person assailing the validity of the statute, and that burden has not been sustained by appellant here. Moreover, both the record in this case and facts subject to the Court's notice demonstrate that the regulatory provisions of the Bituminous Coal Act are not arbitrary, capricious, or unreasonable. A maladjustment between capacity and demand, aggravated by physical and economic factors which prevented the closing down of mines and by competitive practices peculiar to the industry, had brought about deplorable conditions in periods of general prosperity as well as of nation-wide adversity. Cf. *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344; *Carter* v. *Carter Coal Co.*, 298 U. S. 238. Indeed, the circumstances warranting the establishing of minimum prices in the coal industry were substantially the same as those described by this Court in *Nebbia* v. *New York*, 291 U. S. 502, with respect to the milk industry.

D. The price-fixing provisions of the Bituminous Coal Act contain much more detailed standards than those prescribed for the use of the Interstate Commerce Commission and the Secretary of Agri-

culture in fixing rates under the Interstate Commerce Act and the Packers and Stockyards Act and in other regulatory statutes. The argument that there is an invalid delegation of legislative power is plainly without substance. Nor does the statute contain an invalid delegation of power because the Commission may determine whether coal is bituminous within the meaning of the Act. The definition of "bituminous coal" in Section 17 (b) of the statute constitutes a satisfactory standard, which is not rendered inadequate because of the possible existence of borderline cases where its application may be difficult. Cf. *Shields* v. *Utah Idaho Central Railroad Co.*, 305 U. S. 177.

E. The grant of authority to the Commission to determine the question of fact as to the status of coal under the Act is not an invalid delegation of judicial power. The grant of such authority to administrative agencies, subject to appropriate judicial review, has never been regarded as in violation of the Judiciary Article of the Constitution. The authority of the Commission is not final, since its decisions are reviewable by the courts. *Crowell* v. *Benson*, 285 U. S. 22, is not in point; appellant is admittedly engaged in interstate commerce, and no constitutional rights depend upon the factual question here in issue. Cf. *Shields* v. *Utah Idaho Central Railroad Co.*, 305 U. S. 177.

II

Appellant argues that it is not subject to the 19½ percent tax imposed by Section 3 (b) because the tax does not apply to producers who are not members of the code. The section provides specifically, however, that producers who become code members are exempt from the tax. If the tax is not applicable to non-code members, it cannot apply to any one. Both the language of the statute and its legislative history show that Congress did not intend to accomplish any such absurd result.

III

A. The 19½ percent tax imposed by Section 3 (b) of the Act is valid regardless of whether it is a tax or a penalty, inasmuch as the regulatory provisions which the section is aimed to effectuate are a legitimate exercise of the commerce power. There can be no question of the power of Congress to impose penalties in order to enforce laws enacted under any of the enumerated powers.

B. Appellant argues that the imposition of the 19½ percent tax only upon non-code members would constitute an arbitrary classification in violation of the due process clause. If the tax be a penalty, as appellant elsewhere contends, there can be no improper classification in applying it only to those who fail to comply with the regulatory plan which it is designed to enforce. Furthermore, the choice of whether to subject itself to the tax or the

regulatory scheme lay entirely with appellant, and appellant cannot complain because the burden of the tax now turns out to be greater than that of the system of regulation which it could voluntarily have accepted instead. In any event, the differentiation between code members and non-code members is valid as a means of equalizing the burdens imposed upon the two groups. Non-code members are free from the regulatory provisions as to prices and methods of competition, and thus have a substantial competitive advantage over code members. This in itself would "warrant the imposition of a heavier tax burden." *New York Rapid Transit Corp.* v. *New York*, 303 U. S. 573, 580.

IV

A. The District Court refused to permit appellant to relitigate the question of the status of its coal under the Act on the ground that that question had already been considered and decided by the Circuit Court of Appeals in *Sunshine Anthracite Coal Co.* v. *National Bituminous Coal Commission, supra.* The decision in that case is clearly *res judicata* with respect to that question. The issue raised in the two cases as to whether appellant's coal was bituminous within the meaning of Section 17 (b) of the Act is identical. Although the National Bituminous Coal Commission and the collector of internal revenue may nominally be different parties, they are in legal effect the same, both representing the

United States. Under the statute the Commission determines the applicability of the Coal Act both for regulatory and tax purposes. It is settled that there is privity between officers representing the same government, and that although a judgment entered in a case against a collector may not be binding in a suit against the United States, a judgment in an action against the United States or its representative is conclusive in a suit against a collector. *Tait* v. *Western Maryland Railway Company*, 289 U. S. 620. Appellant attacks the Commission's jurisdiction in the prior case. But the question of jurisdiction was expressly passed upon by the Circuit Court of Appeals, and this Court has repeatedly declared that when a jurisdictional question is presented and decided, the principles of *res judicata* apply to it as well as to other issues in the case.

B. The district court also was barred from determining the status of appellant's coal because of the existence of a complete administrative and statutory remedy, the adequacy of which has been demonstrated with respect to appellant itself. Courts of equity lack jurisdiction when such an administrative remedy exists. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41. Moreover, the power to review the orders of the Commission is vested by the Act exclusively in the Circuit Courts of Appeals (Section 6 (b), (d)). This statutory limitation upon the jurisdiction of the district courts is valid. *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337.

V

The discretion of the court below was properly exercised in refusing to grant appellant injunctive relief against collection of taxes accruing between December 4, 1939, and the date of this Court's final decision.

ARGUMENT

I

THE REGULATORY PROVISIONS OF THE BITUMINOUS COAL ACT OF 1937 ARE CONSTITUTIONAL

A. INTRODUCTORY: THE CARTER AND ATLANTA CASES

The Bituminous Coal Conservation Act of 1935 (c. 824, 49 Stat. 991) contained regulatory provisions with respect to price fixing and methods of competition in substance identical with those in the Bituminous Coal Act of 1937. However, the 1935 Act also contained provisions which are not in the present Act, regulating hours, wages, and labor relations. In *Carter* v. *Carter Coal Co.*, 298 U. S. 238, six Justices of this Court held the labor provisions invalid for various reasons. The five Justices who concurred in the majority opinion ventured no opinion as to the constitutionality of the price-fixing provisions, but held that they were inseparable from the labor provisions and fell for that reason. The separate opinion of Mr. Chief Justice Hughes, dissenting on the question of separability, indicated that he thought the price-fixing provisions a valid regulation of interstate com-

merce. The dissenting opinion of Mr. Justice Cardozo, concurred in by Mr. Justice Brandeis and Mr. Justice Stone, declared that the Act was separable, and then proceeded to demonstrate that the price-fixing provisions were constitutional. Thus, no member of this Court cast doubt upon the validity of those provisions of the 1935 Act which have been reenacted in the present law, and four Justices declared or indicated that such provisions were valid.

After the *Carter* decision, Congress passed the Bituminous Coal Act of 1937. The primary differences between that Act and the 1935 Act are that (1) the labor provisions and statement of purpose found objectionable by the majority of this Court were eliminated; (2) the regulatory provisions of the Act were clearly and specifically confined to transactions in, or directly affecting, interstate commerce (as the old Act was not); and (3) minimum prices, instead of being fixed by district boards subject to change by the Commission, were to be fixed by the Commission after proposals made by the district boards. See House Report No. 294, 75th Cong., 1st Sess., pp. 2–3. These changes were made to avoid attacks which had been made upon the constitutionality of the 1935 Act.

The constitutionality of the Act of 1937 has previously been upheld by a three-judge district court in the District of Columbia. *City of Atlanta* v. *National Bituminous Coal Commission*, 26 F. Supp.

606, affirmed on another ground *sub nom. City of Atlanta* v. *Ickes,* No. 32, this Term. In a well-considered opinion, the District Court there held that the Act was valid under the commerce clause, did not violate the due-process clause, and contained no forbidden delegation of legislative power.

B. THE REGULATORY PROVISIONS OF THE ACT ARE WITHIN THE POWER OF CONGRESS UNDER THE COMMERCE CLAUSE

Section 4 of the Bituminous Coal Act of 1937 contains various regulatory provisions, including proscription of specified unfair trade practices, and authorization to the Commission to establish minimum prices and marketing rules and regulations. These provisions, however, are applicable only to sales or transactions in, or directly affecting, interstate commerce (Sec. 4). Practically all of the coal produced by appellant is sold in states other than Arkansas (R. 114). These sales are sales in interstate commerce, and the regulation by Congress of the conditions of such sales, primarily through the establishment of prices and marketing rules, constitutes a regulation of interstate commerce itself and is within the power of Congress under the commerce clause. This proposition is indisputably established by the decisions of this Court upholding the power of Congress under the commerce clause to fix the price of milk and the volume of tobacco sold in interstate com-

merce. *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533; *Mulford* v. *Smith*, 307 U. S. 38; cf. *Currin* v. *Wallace*, 306 U. S. 1. See, also, *Baldwin* v. *Seelig*, 294 U. S. 511; *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50; *Public Utilities Commission* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83, which indicate that the states have no power to regulate prices in interstate commerce because of the existence of the paramount federal power.[11]

Regulation of the price term of interstate sales is a regulation of interstate commerce and within the commerce power of Congress for all commodities sold in interstate commerce. The nature of the

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[11] In his dissenting opinion in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 326, Mr. Justice Cardozo stated:

"(1) With reference to the first objection, the obvious and sufficient answer is, so far as the Act is directed to interstate transactions, that sales made in such conditions constitute interstate commerce, and do not merely 'affect' it. *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 290; *Flanagan* v. *Federal Coal Co.*, 267 U. S. 222, 225; *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, 60; *Public Utilities Comm'n* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83, 90; *Federal Trade Comm'n* v. *Pacific States Paper Trade Assn.*, 273 U. S. 52, 64. To regulate the price for such transactions is to regulate commerce itself, and not alone its antecedent conditions or its ultimate consequences. The very act of sale is limited and governed. Prices in interstate transactions may not be regulated by the states. *Baldwin* v. *Seelig*, 294 U. S. 511. They must therefore be subject to the power of the nation unless they are to be withdrawn altogether from governmental supervision. Cf. *Head Money Cases*, 112 U. S. 580, 593; Story, Commentaries on the Constitution, § 1082. If such a vacuum were permitted, many a public evil incidental to interstate transactions would be left without a remedy * * *."

commodity is plainly immaterial to the scope of the commerce clause. Certainly, that power must exist with respect to a product as essential to the national economy as bituminous coal.

C. THE ACT DOES NOT VIOLATE THE DUE-PROCESS CLAUSE OF THE FIFTH AMENDMENT

1. THE FIXING OF PRICES BY CONGRESS DOES NOT VIOLATE THE DUE-PROCESS CLAUSE

Cases recently decided by the Court establish that the due-process clause does not forbid price fixing by legislative action. In *Mayo* v. *Lakeland Highlands Canning Co.*, No. 270, this Term, the Court declared with respect to the Florida law permitting the fixing of prices for citrus fruit that "The mere fact that the act fixes prices is, in itself, insufficient to invalidate it". The *Rock Royal* case, *supra*, and *Nebbia* v. *New York*, 291 U. S. 502, which upheld federal and state regulation of milk prices, demonstrate that the federal power over interstate sales is as broad as that of the states over intrastate sales. In the *Rock Royal* case (307 U. S., at 571), this Court said: "The power enjoyed by the states to regulate the prices for handling and selling commodities within their internal commerce rests with the Congress in the commerce between the states."

It follows that no attack against the general purpose or character of this legislation can be bottomed upon the Fifth Amendment. It is neither appropriate nor necessary to consider the economic circumstances which prompted Congress to enact

the statute. Intelligent men may differ as to whether Congress acted wisely or reasonably in providing for governmental control of the price of bituminous coal. These considerations are not properly subjects for judicial consideration. If, however, it were proper or necessary to discuss the economic background of this legislation, an overwhelming showing as to the propriety and wisdom of the congressional action could be made.

2. THE CONDITIONS IN AND THE HISTORY OF THE BITUMINOUS COAL INDUSTRY SHOW THAT THE FIXING OF PRICES IS REASONABLE AND CONSONANT WITH DUE PROCESS

Even if we assume that although the due process clause contains no general prohibition against the fixing of prices, an exercise of the power to regulate prices may be inappropriate for a particular industry, no such objection can validly be taken in the instant case. In the absence of any evidence in the record or facts of which the Court may take notice indicating that a statute fixing prices for the bituminous coal industry is arbitrary, capricious, or unrelated to a proper legislative object, we submit that the law must be upheld on its face. *United States* v. *Carolene Products Co.*, 304 U. S. 144; *Pacific States Box & Basket Co.* v. *White*, 296 U. S. 176; *Metropolitan Casualty Co.* v. *Brownell*, 294 U. S. 580, 584, and cases cited therein. The burden is upon the party assailing a statute to prove factually the manner in which it fails to comply with due process. No effort has been made by appellant here to sustain that burden.

But in this case we are not forced to rely merely upon the absence of evidence that the Bituminous Coal Act is arbitrary or unreasonable. Facts in the record and those of which the Court may take judicial notice affirmatively demonstrate that price fixing in the coal industry does not violate the due-process clause. The facts of record with respect to conditions in the industry are set forth in a stipulation of fact which in language and substance conforms closely to the words of Mr. Justice Adkins in his opinion in the District Court in *Carter* v. *Carter Coal Company*, 63 Washington Law Reporter 986. In addition to these facts, the Court may take judicial notice of the description of the industry in its own opinions (*Carter* v. *Carter Coal Co.*, 298 U. S. 238, 330; *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 361) and in Congressional Committee Reports and documents referred to therein.[12] The District Court based its findings of fact both upon the stipulation and upon the facts subject to its notice.

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[12] The committee reports on the Bituminous Coal Act of 1937 (S. Rept. 252, H. Rept. 294, 75th Cong., 1st Sess.) do not in themselves describe in detail the condition of the industry, but they refer to the House Report on the Bituminous Coal Conservation Act of 1935 (H. Rept. 1800, 74th Cong., 1st Sess.), to the hearings held before the 1935 Act was enacted (Hearings on H. R. 8479, 74th Cong., 1st Sess.) and to numerous investigations or hearings held before Congressional committees and executive commissions as providing the factual basis for the legislation (see H. Rept. 294, *supra*, pages 1–2, 15). In particular, the committee reports refer to the findings of the district courts and the opinions

From these sources, all of which give the same picture, we summarize the conditions in the industry.

As found by the court below (R. 47), bituminous coal is the Nation's primary source of energy. It is vital to the public welfare. It supplies about 75 percent of the energy used by public utilities and in manufacturing, and about 83 percent of the fuel used by locomotives operating on the railways. The railroads of this country are largely dependent upon this industry, not only for their supplies of fuel, but also for revenue. Over a period of years the coal transported by railroads has constituted from 26 to 33 percent of their freight, and it has furnished from 16 to 19 percent of the total revenues of carriers (R. 47, 114).

The list of producers who have subscribed to the Bituminous Coal Code includes more than 11,000 members, scattered throughout 31 states.[13] Total investment in the industry has been estimated at from 2 to 2½ billion dollars.[14] It has been estimated that over 400,000 miners are employed in the industry.[15]

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of this Court in the *Carter* and *Appalachian* cases as furnishing "adequate material from which a picture of the soft-coal industry and the need of this bill can be drawn." H. Rept. 294, *supra*, page 1. See also National Resources Committee, *Energy Resources and National Policy*, pp. 15–19, 41–122, 338 *et seq.*, 405–416.

[13] *Energy Resources and National Policy*, *supra*, at p. 73.

[14] Id., p. 74.

[15] Minerals Yearbook (1939), p. 770.

From this brief summary of facts, it is apparent that the industry regulated by the Act is of fundamental importance to the national welfare and to interstate commerce, not only in coal but also in transportation, electric power, manufactured articles, and countless other commodities. It is no exaggeration to say that the welfare of the nation depends to a substantial extent upon the stability and prosperity of the bituminous coal industry. This has been recognized by a series of investigations and regulatory endeavors by both state and federal governments, extending over a long period of years. The creation of the Federal Bureau of Mines, and state legislation relating to mine inspection, accident prevention, property rights, intrastate transportation of coal, and reporting of production and reserves represent one phase of these activities.[16] At least 19 separate Congressional investigations and hearings on the subject of coal were conducted, beginning in the year 1913 and continuing almost annually until enactment of the present statute.[17] And it is significant that the House Report on the Act (H. Rept. 294, 75th Cong., 1st Sess.) relies in part upon this long history and these protracted investigations to show the need for the Act. The present Act, therefore, is the culmination of years of investigation and of

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[16] *Energy Resources and National Policy*, *supra*, pp. 111–113.

[17] H. Rept. 294. 75th Cong., 1st Sess., pp. 1, 15; see *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 331 (dissent).

efforts to stabilize interstate commerce in this basic industry.

The chaotic conditions in the industry which led to the passage of this Act have resulted from a combination of physical and economic factors. In recent years, due largely to overexpansion of the industry during the Great War, to competition from other fuels, and to increased efficiency in the use of fuel, the amount of soft coal consumed has markedly declined [18] (R. 47–48, 115). Even before the war there had been an excess of capacity over demand, and the diminution in consumption served greatly to accentuate this overcapacity [19] (R. 48). Because of the high cost of temporarily shutting down a mine due to physical repairs, taxes, and royalties, operators will commonly continue to operate although the price of coal is below the cost of production (R. 48, 115). In view of the relatively high overhead costs in the operation of a mine, each operator endeavors to increase his production as long as coal can be sold above actual out-of-pocket costs. (*Ibid.*) There is a tendency to reduce prices in order to obtain sufficient orders to keep the mine running at full capacity. (*Ibid.*) As a consequence of these facts, capacity does not readily adjust itself to decreasing demand despite great re-

[18] H. Rept. No. 1800, 74th Cong., 1st Sess., p. 2; *Appalachian Coals, Inc.* v. *United States*, 288 U. S., at 361, 369; *Carter* v. *Carter Coal Co.*, 298 U. S., at 330.

[19] *Energy Resources and National Policy*, *supra*, note 25, at p. 15.

ductions in price. (*Ibid.*) As prices drop each producer seeks only to increase his individual production so that he may survive (R. 48). "The utilization of excess mining facilities has resulted in overproduction, which in turn, has caused a bitter struggle for markets and merciless cutthroat competition" (S. Rept. 252, 75th Cong., 1st Sess., p. 2) (R. 48). The situation was vividly described by Mr. Justice Cardozo in his opinion in the *Carter* case (298 U. S., at 330): "Overproduction was at a point where free competition had been degraded into anarchy. Prices had been cut so low that profit had become impossible for all except the lucky handful." [20]

These circumstances were aggravated by competitive factors peculiar to the coal industry (R. 48). Consumers generally specify that they desire coal of a particular size. Since coal comes out of the mine in various sizes, unsold sizes are often produced in the course of the mining operation (R. 48, 114–115). Since it is uneconomical to store coal and since mines generally do not have storage facilities, all of the coal, including the unsold sizes, is immediately loaded into railroad cars at the mine. (*Ibid.*) In order to avoid a congestion at mine tracks and the suspension of operations which would ensue, the unsold sizes are often consigned and shipped to some consuming territory. (*Ibid.*) Because of demurrage charges, which would in time

[20] See also S. Rept. 252, 75th Cong., 1st Sess., pp. 2–3.

exceed the amount obtainable for the coal, producers are under pressure to slash prices on such consigned shipments. (*Ibid.*) [21]

These and other factors caused the average price of coal to drop from $2.68 per ton in 1923 to $1.78 in 1929 (during which period prices generally were quite stable) and to $1.31 in 1932 (R. 48, 117). For the year 1937, a period of relatively active demand, the average loss per ton of coal was eleven cents; the larger commercial mines alone lost over $37,000,000 during that year.[22] The consequence of the fierce competition to sell at any price was that "Mining communities without number have become the habitations of misery; the vast business and professional population dependent upon the coal industry has been impoverished, while thousands of operators have been reduced to bankruptcy by irrational and destructive methods which the bill aims to end once and for all. * * * acute financial distress among operators and intense poverty among miners have prevailed during periods of general prosperity as well as in times of Nation-wide adversity" (S. Rept. 252, 75th Cong., 1st Sess., pp. 2–3).

The conclusion of the House committee reporting the present statute was that the condition of the

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[21] See *Appalachian Coals, Inc.* v. *United States*, 288 U. S., at 362–363; H. Rept. 1800, 74th Cong., 1st sess., p. 2.

[22] Third Annual Report under the Bituminous Coal Act of 1937, pp. 4–5. This is the last year for which official figures are available.

bituminous coal industry "imperatively demands such regulation in order to remedy evils which seriously endanger the industry itself and the health and well-being of many people in many parts of the country" (H. Rept. 294, 75th Cong., 1st Sess., p. 1). The Senate Report states that "In the circumstances, it is believed that the only hope of a rational solution of the innumerable problems of the bituminous-coal industry lies in the Federal regulation which the bill proposes to establish" (S. Rept. 252, 75th Cong., 1st Sess., p. 3).

The circumstances outlined above demonstrate that Congress was not arbitrary or capricious in endeavoring to alleviate conditions in the bituminous coal industry through the establishment of minimum prices. In *Nebbia* v. *New York*, 291 U. S. 502, this Court upheld the validity under the due process clause of the fixing of prices for milk; a legislative investigation of the milk industry had "disclosed destructive and demoralizing competitive conditions and unfair trade practices which resulted in retail price-cutting and reduced the income of the farmer below the cost of production." "* * * the normal law of supply and demand was insufficient to correct maladjustments detrimental to the community" (291 U. S., at 530). As Mr. Justice Cardozo recognized in his dissenting opinion in the *Carter* case, "All this may be said, and with equal, if not greater force, of the conditions and practices in the bituminous coal industry,

not only at the enactment of this statute in August, 1935, but for many years before" (298 U. S., at 330).[23]

The due-process clause does not forbid Congress from seeking to remedy such conditions by the establishment of minimum prices. "Congress was not condemned to inaction in the face of price wars and wage wars so pregnant with disaster. * * * The liberty protected by the Fifth Amendment does not include the right to persist in this anarchic riot. * * * The free competition so often figured as a social good imports order and moderation and a decent regard for the welfare of the group" (Mr. Justice Cardozo dissenting, in *Carter* v. *Carter Coal Co.*, 298 U. S., at 331).

Appellant's brief (pp. 37–38) asserts that the Act is invalid because it may increase the evils which afflict the coal industry. This argument is directed to the wisdom and policy of the law. "With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to for-

[23] Comparison of the facts of the coal industry with the facts of the milk industry, as described in the opinion of this Court in the *Nebbia* case, will reveal a remarkable parallel between the basic economic factors which make price fixing in each industry a reasonable exercise of governmental power. Almost every fact mentioned by this Court in the *Nebbia* case in connection with milk has its equivalent in the bituminous coal industry. See the opinion of Mr. Justice Adkins in *Carter* v. *Carter Coal Co.*, 63 Wash. Law Rep. 986, 999, and the "Brief for Government Officers" in this Court, No. 636, 1935 Term, pp. 162–164.

ward it, the courts are both incompetent and unauthorized to deal." *Nebbia* v. *New York*, 291 U. S. 502, 537.

D. THE ACT DOES NOT CONTAIN AN INVALID DELEGATION OF LEGISLATIVE POWER

As compared with other regulatory statutes of similar nature, the Act is unusual in respect of its detailed, specific, and limited authorization and direction to the regulatory agency. It is confined to one commodity, bituminous coal, which is defined in Section 17 (b). The area of regulation is expressly defined (see Annex to Act) and restricted to "domestic market" as defined in Sec. 4 (e). The duration of the Act is limited to April 25, 1941. The unfair trade practices sought to be eliminated are expressly listed (Sec. 4 (i)); and with respect to the fixing of minimum prices, the most significant portion of the statute, the Act sets forth a detailed procedure and describes elaborate standards to govern the Commission's determinations.

The basis upon which minimum prices are to be established is prescribed in the statute with clarity and precision. They are to be fixed so as to yield an average return per net ton upon the entire tonnage of each minimum-price area (a geographical region specifically defined) approximating the weighted average of the total cost per net ton of the tonnage of such minimum-price area. This is a simple mathematical standard, permitting a minimum of discretion in the agency exercising the del-

egated power. Indeed, the Act even goes so far as specifically to enumerate the elements of cost which are to be computed (Sec. 4, II (a), 3d paragraph). There is no choice as to the level at which the minimum prices are to be fixed. Congress has clearly determined and unmistakably declared its policy and laid down a narrow path for administrative action.

Similarly, Congress has described, step by step, the procedure for fixing the minimum prices and has prescribed rigid standards with which each determination must comply. It has divided the process into three phases: First, the determination of the weighted average cost of each of the minimum-price areas, the elements of cost being specifically defined; second, the classification of the various sizes and grades of coal (Sec. 4, II (a)), which "shall reflect, as nearly as possible, the relative market value of the various kinds, qualities, and sizes of coal, shall be just and equitable as between producers within the district, and shall have due regard to the interests of the consuming public"; and, third, the establishment of coordinated minimum prices for the coals so classified (Sec. 4, II (b)), so as (1) to reflect, as nearly as possible, the relative market values of the various coals at points of delivery, taking into account various specifically enumerated factors; (2) to preserve as nearly as may be existing fair competitive opportunities; (3) to be just and equitable as between

the various producing districts which are specifically defined in the Act; and (4) consistently with the process of coordination, to yield a return to each minimum-price area approximating its weighted average cost per ton.

It would have been obviously impracticable for Congress to have prescribed more detailed standards to guide administrative discretion. The standards are far more precise than those established for the use of the Interstate Commerce Commission and the Secretary of Agriculture in fixing rates under the Interstate Commerce Act [24] and the Packers and Stockyards Act [25] respectively. In his dissenting opinion in the *Carter Coal* case, Mr. Justice Cardozo stated—we think conservatively—that (298 U. S., at 333) "the standards established by this Act are quite as definite as others that have had the approval of this court." [26] It

[24] Section 15 (1) of the Interstate Commerce Act (c. 91, 41 Stat. 484, 49 U. S. C., Sec. 15 (1), authorizes the Commission to prescribe "what will be the just and reasonable" rates.

[25] Section 310 of the Packers and Stockyards Act (c. 64, 42 Stat. 166, 7 U. S. C., Sec. 211) authorizes the Secretary of Agriculture to prescribe "what will be the just and reasonable" rates. The validity of this provision has been established. *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420.

[26] Compare *United States* v. *Rock Royal Co-operative, Inc., supra; Currin* v. *Wallace, supra; New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 24 (in the public interest); *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 285 (public convenience, interest, or necessity); *Avent* v. *United States*, 266 U. S. 127,

is difficult to see how Congress could have set up standards more precise without actually fixing the prices itself.

Appellant argues (Br., pp. 21–22) that if the Commission be permitted to determine what coal is subject to the Act, the Act contains an unconstitutional delegation of legislative power.

The Act is entitled, "An Act To regulate interstate commerce in bituminous coal, and for other purposes." The term "bituminous coal" is defined in Section 17 (b) of the Act as follows:

> SEC. 17. As used in this Act—
>
> * * * * *
>
> (b) The term "bituminous coal" includes all bituminous, semibituminous, and subbituminous coal and shall exclude lignite, which is defined as a lignitic coal having calorific value in British thermal units of less than seven thousand six hundred per pound and having a natural moisture content in place in the mine of 30 per centum or more.

This definition serves as an adequate standard for administrative action.[27]

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and *United States* v. *Chemical Foundation*, 272 U. S. 1 (in the public interest); *Colorado* v. *United States*, 271 U. S. 153, 168, and *Chesapeake & Ohio Railway* v. *United States*, 283 U. S. 35, 42 (certificates of public convenience and necessity); *Wayman* v. *Southard*, 10 Wheat. 1; *Buttfield* v. *Stranahan*, 192 U. S. 470 (purity, quality, and fitness for consumption); *Union Bridge Co.* v. *United States*, 204 U. S. 364 (unreasonable obstruction to navigation); *Mahler* v. *Eby*, 264 U. S. 32 (undesirable resident).

[27] Compare the cases cited in Note 26.

In *Shields* v. *Utah Idaho Railroad Co.*, 305 U. S. 177, this Court considered a similar contention that the phrase "interurban electric railway" was too indefinite a standard to guide the Interstate Commerce Commission in determining the scope of an exemption proviso in the Railway Labor Act. In rejecting the argument, this Court said (305 U. S., at 180, 181):

> Congress did not define the term "interurban." Despite the desirability of such a definition and the difficulties occasioned by its absence, the term is not so destitute of meaning that it can be denied effect as a valid description. * * * The conferring of authority upon the Interstate Commerce Commission to determine whether a particular electric railway is an interurban one cannot be regarded as an unconstitutional delegation of power. See *United States* v. *Chicago North Shore & M. R. Co.*, *supra*, at pp. 13, 14.

We believe that the term "bituminous coal", even undefined, is at least as specific as "interurban railway." Each expression describes something with characteristics which are generally understood by lawyers and laymen. Cf. *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245, 256–257, for a description of the properties of coal. Since "bituminous coal" is defined in the Coal Act, the *Shields* case is *a fortiori* in point here.

Appellant's argument that the statutory standard is too indefinite is based entirely on the premise

that there may be border-line cases where application of the statutory definition may be difficult or doubtful. No decision with respect to the problem of delegation of power has even intimated that a delegation may be unlawful because the statute does not definitely direct the decision which the administrative body must reach in each case. Indeed, the purpose of delegating authority to administrative agencies is to give them discretion to fill in such details as are necessary to effectuate legislative action. Here, too, the interurban railway cases are in point. In those cases, this Court noted that "it is not always easy to draw the line" and that "Instances may be supposed where great difficulty might be experienced in determining whether an electric railway line falls within or without the exception" (*Piedmont & Northern Railway Co.* v. *Interstate Commerce Commission*, 286 U. S. 299, 312; *United States* v. *Chicago North Shore R. Co.*, 288 U. S. 1, 10; cf. *Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 177, 180–181, 187). If Congress could authorize an administrative agency to determine the ultimate question of fact involved in those cases, it clearly can do so here.

E. THE ACT DOES NOT CONTAIN AN INVALID DELEGATION OF JUDICIAL POWER

Appellant has contended that if the Bituminous Coal Act be construed as authorizing the Coal Commission to determine in the first instance[28] what

[28] The determinations of the Commission are reviewable in the Circuit Court of Appeals. Sections 4–A and 6.

oal is subject to the Act, there is an unconstitu-ional delegation of *judicial* power to an adminis-rative agency.

The appellant's brief does not clarify either the cope or the implications of this argument. If ap-ellant means to argue that under the Constitution, 'ongress has no power to authorize administrative odies to make limited factual determinations, sub-ect to judicial review, the argument finds no sup-ort in the words of the Constitution and flies in he face of a half century of experience and prac-ice approved by this Court. The use of adminis-rative agencies to determine questions of fact has ever been held to conflict with the Judiciary Ar-icle of the Constitution. See, e. g. *Shields* v. *Utah daho Central R. Co.*, 305 U. S. 177; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125.

If appellant's position is that the Constitution oes not permit Congress to authorize an adminis-rative agency to determine such questions of fact ith finality, the argument has no application to he facts of the instant case. Orders of the Com-ission are reviewable by the courts (Section 6 b)). In the present case appellant has had the enefit of a full judicial review of the Commis-ion's determination as to the status of its coal.

Appellant relies upon *Crowell* v. *Benson*, 285 . S. 22. That case held that the courts must de-

termine for themselves the existence of jurisdictional facts upon which the "constitutional rights of the citizen depend" (285 U. S., at 56). Here, appellant is engaged in interstate commerce (R. 114), and there is no constitutional barrier to subjecting its sales of coal to the Bituminous Coal Act. Accordingly, this case is governed by the *Shields* case, wherein this Court said (305 U. S. at 180):

> As respondent, however characterized, is engaged in interstate transportation, the question whether it should be subjected to the requirements of the Railway Labor Act relating to the adjustment of labor disputes, was one for the decision of Congress. These requirements were prescribed in the exercise by Congress of its constitutional control over interstate commerce. *Texas & New Orleans R. Co.* v. *Railway Clerks*, 281 U. S. 548; *Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515. As Congress was free to establish the categories which should be excepted, Congress could bring to its aid an administrative agency to determine the question of fact whether a particular railroad fell within the exception, and Congress could make that factual determination, after hearing and upon evidence, conclusive.

See *South Chicago Coal and Dock Co.* v. *Bassett*, No. 262, this Term, which also indicates that *Crowell* v. *Benson* applies only where the question

relates to the constitutional jurisdiction of the federal agency.

II

The 19½% Tax Is Applicable to Non-Code Members

Appellant argues that it is not subject to the 19½% tax imposed by Section 3 (b) because that section does not apply to producers who are not members of the code. This contention that Section 3 (b) does not apply to non-code members runs contrary to its plain meaning and purport. The second sentence of Section 3 (b) provides that producers of coal who become code members are exempt from the tax imposed by the previous sentence. If the tax is not applicable to non-code members, it is not applicable to anyone. It cannot be assumed that Congress intended to arrive at so absurd a result.

Appellant bases its argument on the provision in Section 3 (b) that the tax shall be imposed upon sales of coal by a producer thereof, "which would be subject to the application of the conditions and provisions of the code provided for in section 4, or of the provisions of section 4-A". Since only code members are subject to the Code provided for in Section 4, it is argued that the tax is inapplicable to non-code members.

The argument is based on a misinterpretation of the language of the Act. Section 4, setting out the

provisions of the Code, is by its terms applicable "to matters and transactions in or directly affecting interstate commerce in bituminous coal". Section 3 (b) applies to the sale and disposition of coal which "would be" subject to the application of Section 4 or Section 4–A, i. e., to coal in or affecting interstate commerce, not to coal which *is* subject to those provisions. The use of the subjunctive was undoubtedly deliberate. The tax was intended to apply only to those sales by non-code members which would be subject to regulation if the producer were a code member. The obvious purpose of the provision is to avoid constitutional difficulties which might arise if the 19½% tax applied to sales which could not be regulated under the commerce power.[29]

That this construction is the proper one seems clear enough from the language of the Act. Were the matter at all doubtful, the legislative history removes any possible ambiguity. The House Committee Report (No. 294, 75th Cong., 1st Sess.)

[29] This limitation upon the scope of the tax imposed by Section 3 (b) was not found in the Bituminous Coal Conservation Act of 1935, which purported to rest on both the commerce and taxing powers (H. Rept. 1800, 74th Cong., 1st Sess.). The Bituminous Coal Act of 1937, which is a revision of the 1935 Act for the primary purpose of avoiding constitutional obstacles, was based solely on the commerce power (H. Rept. 294, 75th Cong., 1st Sess.). Since the 19½% tax is "in aid of the regulation of interstate commerce in coal" (*ibid.*, at p. 4), constitutional difficulties might have arisen if it had been applied to purely local transactions.

states, with respect to the tax levied by Section 3 (b) (pp. 3–4):

> Another tax of 19½ percent is imposed on the sale or disposal of coal, to which the code would apply, when the producer thereof is not a code member.
>
> * * * * * *
>
> Under subsection (b) a tax of 19½ percent is applied to coal which would be subject to the provisions in section 4 or the provisions of section 4A. Producers who are code members are exempt from this tax. This tax is intended to be in aid of the regulation of interstate commerce in coal provided for in sections 4 and 4A.

Further evidence that the tax was intended to be levied upon non-code members appears in Section 5 of the Act, which plainly associates non-code membership with tax liability. Furthermore, it may be noted that Section 3 (c) of the Act provides that the tax imposed by Section 3 (b) shall be collected from the "producer." This Court has held that the term "producer" as used in Section 10 (a) of the Bituminous Coal Act of 1937 includes producers who are not members of the Code. *Utah Fuel Company* v. *National Bituminous Coal Commission*, 306 U. S. 56. There is no valid reason why the same term should be given a different meaning when used in Section 3 (b).

As heretofore stated, plaintiff's construction would make the entire taxing provision meaningless, for the only persons who would be subject to

the tax are those who are exempt from it. Such a construction could not be accepted even if the meaning of Section 3 (b) were really doubtful. "To construe statutes so as to avoid results glaringly absurd, has long been a judicial function. Where, as here, the language is susceptible of a construction which preserves the usefulness of the section, the judicial duty rests upon this Court to give expression to the intendment of the law." *Armstrong Paint and Varnish Works* v. *Nu Enamel Corp.*, 305 U. S. 315, 333. Cf. *United States* v. *Ryan*, 284 U. S. 167, 175; *Sorrells* v. *United States*, 287 U. S. 435, 446–448, and cases there cited.

III

THE 19½% TAX IMPOSED BY SECTION 3 (b) OF THE BITUMINOUS COAL ACT IS VALID

A. THE 19½% TAX IS VALID AS A SANCTION TO ENFORCE THE REGULATORY PROVISIONS OF THE ACT

Section 3 (b) of the Bituminous Coal Act imposes a 19½% tax on sales of coal subject to the regulatory provisions of the Act, with an exemption for those producers who are members of the Bituminous Coal Code (see pp. 39–42 *supra*). It is contended that this tax is not a true tax but a penalty to compel compliance with the regulatory provisions contained in the Code. Although we believe that the exaction is a tax, we agree with the court below (R. 42) that "the question of nomenclature" is immaterial. If Section 3 (b) be regarded as a penalty, it would not for that reason

be invalid, as long as the regulatory features of the Act which it is aimed to effectuate are a legitimate exercise of the commerce power.[30]

No one would deny that Congress may impose penalties in order to enforce laws enacted under any of the enumerated powers. The power exercised is in no way diminished or lost by the fact that Congress used a tax as one of the sanctions for enforcing it. Since Congress could have imposed the same liability and denominated it a penalty, no constitutional rights are infringed by its imposition as a tax. In *United States* v. *Butler*, 297 U. S. 1, 61, 69, the Court declared:

> It does not follow that as the act is not an exertion of the taxing power and the exaction not a true tax, the statute is void or the exaction uncollectible. For, to paraphrase what was said in the *Head Money Cases* (*supra*), p. 596, if this is an expedient regulation by Congress, of a subject within one of its granted powers, "and the end to be attained is one falling within that power, the act is not void, because, within a loose and more extended sense than was used in the Constitution," the exaction is called a tax.
>
> * * * * *

[30] It was apparently assumed in all three opinions written by this Court in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, that the taxes imposed by the Bituminous Coal Conservation Act of 1935 would have been valid if the regulatory provisions of that Act had come within the scope of the commerce power.

> The power of taxation, which is expressly granted, may, of course, be adopted as a means to carry into operation another power also expressly granted.

See also *Board of Trustees* v. *United States*, 289 U. S. 48, 58–59; *Veazie Bank* v. *Fenno*, 8 Wall. 533; *Head Money Cases*, 112 U. S. 580.

Since the Bituminous Coal Act is valid under the commerce clause (see pp. 19–21, *supra*), there can be no question as to the constitutionality of the taxes imposed.

B. THE EXEMPTION OF CODE MEMBERS FROM SECTION 3 (b) DOES NOT CONSTITUTE AN ARBITRARY CLASSIFICATION

Appellant argues that if the 19½% tax applies to non-code members and not to code members, Section 3 (b) contains an arbitrary classification in violation of the due process clause. Even if we assume that the Fifth Amendment—which has no equal protection clause—prohibits such classifications (cf. *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 584), there are three reasons why it does not invalidate the statutory provision here under consideration.

1. In the first place, there is no "classification" if the 19½% tax is a sanction to force producers to become code members and to comply with the regulatory provision of the code, as appellant has argued (Br., p. 32). Neither the due-process nor equal-protection clause has ever been regarded

as prohibiting the imposition of a penalty upon those who fail to comply with a regulatory scheme. Cf. *Mulford* v. *Smith*, 307 U. S. 38, which upheld a statute permitting growers wishing to market more tobacco than their statutory quotas to do so upon payment of a penalty of 50% of the price.[31]

2. Secondly, under the Coal Act, no producer can complain of the alleged "classification," inasmuch as it is entirely optional with him in which category he appears. Congress could constitutionally have required all coal producers to join the code, or to comply with similar regulatory provisions without a code. It did not do so, but gave them a choice. Certainly appellant cannot complain because it and other producers have been given an opportunity to accept other burdens in lieu of joining the code. If those burdens now seem heavy, it results entirely from appellant's own choosing.

The existence of this option distinguishes this case from those in which the question of "classification" is usually considered. In such cases, persons who are engaged in a particular activity are not given a choice between two alternative methods of

[31] Appellant states that a code member may violate the prices and rules of the Bituminous Coal Division and "still be immune from any penalty" (Brief, pp. 33–34). This is not correct. Under Section 5 such a code member could be expelled from the Code and required to pay a 39% tax on all coal which he had sold in violation of the Code as a prerequisite to reinstatement.

regulation, as here. If there is any choice, it is only between compliance with a statute or ceasing to engage in the activity regulated.

3. Finally, the differentiation between code members and non-code members would nevertheless be valid as a means of equalizing the burdens imposed upon the two groups. Code members may not sell below prices fixed under the statute.[32] They cannot engage in any of the thirteen unfair methods of competition specifically proscribed. Section 4–II (a). They must pay assessments to the district boards and file various kinds of reports with the administrative agency.

At most, only arbitrary or irrational classifications are forbidden by the due-process clause. *Steward Machine Co.* v. *Davis, supra; Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495; *Paramino Lumber Co.* v. *Marshall*, No. 271, this Term. There is nothing arbitrary or irrational in making a distinction upon the basis of freedom from regulation. Non-code members constitute a class which is not only free to engage in unrestricted competition itself, but is protected from such competition on the part of code members, who cannot reduce prices below those established under the Act or engage in a number of prohibited competitive practices.

[32] Although prices have not yet been established, code members have been bound by the other statutory provisions referred to.

"Freedom from unlimited, direct, private competition is of itself a sufficient advantage over ordinary businesses to warrant the imposition of a heavier tax burden." *New York Rapid Transit Corp.* v. *New York*, 303 U. S. 573, 580. Classifications exempting persons subject to compensating burdens have frequently been upheld. *Travellers' Insurance Co.* v. *Connecticut*, 185 U. S. 364; *General American Tank Car Corp.* v. *Day*, 270 U. S. 367; *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472; *Concordia Fire Insurance Co.* v. *Illinois*, 292 U. S. 535, 547, 548; *Aero Mayflower Transit Co.* v. *Georgia Public Service Commission*, 295 U. S. 285, 290, 291; *Henneford* v. *Silas Mason Co.*, 300 U. S. 577. Clearly the distinction between persons subject to the code and other producers affords a reasonable basis for separate treatment here.

IV

The District Court Did Not Err in Refusing to Determine *De Novo* Whether Appellant's Coal Was Subject to the Bituminous Coal Act

The first count (entitled Paragraph One) (R. 1–7) of appellant's complaint alleges that appellant is not subject to the Bituminous Coal Act because its coal is anthracite or semianthracite and not bituminous.

Prior to the commencement of this case, appellant had petitioned the National Bituminous Coal Commission to hold it exempt from the statute,

pursuant to a procedure which the Commission had established, on the ground that appellant's coal was not "bituminous" within the meaning of Section 17 (b) of the Bituminous Coal Act. The Commission combined a hearing on appellant's petition with a general investigation as to the status of Arkansas coal. Evidence had been heard and proposed reports of the Commission finding appellant subject to the Act filed before this suit in the District Court was commenced (Vol. II, R. 37, 40–47). Appellant filed exceptions to the proposed reports, asserting both that the Commission had no jurisdiction to determine the status of its coal, and that the evidence compelled the opposite conclusion (Vol. II, R. 47–50.) Several months after the suit was filed, the Commission rendered its final decision. It held that it had jurisdiction to decide what coals were subject to the Act (Vol. II, R. 55–57) and that appellant's coal was bituminous within the meaning of the Act (Vol. II, R. 59–65). Appellant thereupon filed a petition for review in the Circuit Court of Appeals for the Eighth Circuit (Vol. II, R. 360–376), in which it attacked the Commission's decision on both the above grounds, as well as for other reasons which need not be mentioned here (Vol. II, R. 362–363). The Court of Appeals considered these questions at length and held that the Commission had jurisdiction and that its decision was supported by substantial evidence and must be affirmed (Vol. II, R. 377–402). In a

petition for rehearing, appellant again presented the same questions to the Court of Appeals (Vol. II, R. 402–411). The petition was denied (Vol. II, R. 412). Appellant then filed a petition for certiorari in this Court raising the same questions. The petition was denied. A petition for rehearing was filed, advancing the same objections. This petition was denied.

The ultimate issue decided in the litigation before the Commission, the Circuit Court of Appeals, and this Court was whether the appellant's coal was "bituminous" within the meaning of Section 17 (b) of the Bituminous Coal Act.

When the present case came up for trial in the court below, after the termination of the above proceedings, appellant insisted upon its right to try this issue over again. It again urged that the Commission had no jurisdiction to determine the status of appellant's coal and that it was the duty of the District Court to try that question *de novo*.

The District Court refused to accept this contention. It held that the determination of this issue in the former proceeding was conclusive upon it, and also that the existence of the statutory remedy before the Commission and the Circuit Court of Appeals deprived the district courts of jurisdiction to determine such questions at all (R. 32–39, 49). We submit that this decision was correct on both grounds.

A. THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS ESTOPS APPELLANT FROM REASSERTING HERE THAT ITS COAL IS NOT BITUMINOUS

1. *Basic Principles and Policy.*—The fundamental principles with respect to the doctrines of *res judicata* and estoppel by judgment are well settled. A judgment is an absolute bar and estoppel to a second action upon the same claim or demand, between the same parties or those in privity with them, "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." "But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." *Cromwell* v. *County of Sac*, 94 U. S. 351, 352–353; *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, 396; *Southern Pacific R. Co.* v. *United States*, 168 U. S. 1, 48; *Myers* v. *International Trust Company*, 263 U. S. 64, 70–71; *United States* v. *Moser*, 266 U. S. 236, 241.

We need not consider here into which of the above categories this case falls, inasmuch as the issue raised in Paragraph One of the complaint here is identical with that adjudicated by the Commission and the Circuit Court of Appeals in the

prior proceeding. The ultimate question in each case was whether appellant's coal was "bituminous" and subject to the Coal Act. All possible aspects of this issue—including the Commission's alleged lack of jurisdiction to determine the matter—were raised by appellant in two oral and five written arguments[33] in the former case and specifically rejected by the Circuit Court of Appeals, after thorough consideration, in its opinion.

Appellant apparently desires that this Court disregard the careful consideration already given to the status of its coal under the Act. Although appellant itself initiated the whole sequence of events running from the application for exemption before the Commission to the denial of a rehearing on the petition for certiorari by this Court, appellant's present position is that all this was entirely meaningless.

Appellant's disregard of the long litigation already conducted pointedly illustrates the reasons for and the sound policy underlying the doctrine of estoppel by judgment. It is the function of the courts to put an end to controversy, not to supply successive forums for debate. "It is just as important that there should be a place to end as that there should be a place to begin litigation." *Stoll v. Gottlieb*, 305 U. S. 165, 172. Neither the time of this Court nor the time and resources of the par-

[33] Before the Commission, the Circuit Court of Appeals and this Court.

ties should be devoted to the trial of issues which have already been determined. This rule, of course, applies fully to government cases, and questions "concerning government or public authority." *New Orleans* v. *Citizens' Bank,* 167 U. S. 371, 398.

2. *Identity of the Parties.*—These forceful considerations of policy are met by appellant with technical contentions. Thus, appellant contends that the earlier litigation cannot give rise to an estoppel because the suits have different parties. In both suits, of course, the Sunshine Anthracite Company was the moving party. Appellant's contention that the parties are different is based solely upon the circumstance that in the prior litigation its adversary was the Coal Commission, while it has brought the present suit against the Collector of Internal Revenue.

The doctrine of *res judicata* may apply even if the parties are not physically the same. "Identity of parties is not a mere matter of form, but of substance. Parties nominally the same may be, in legal effect, different, Bigelow on Estoppel, 6th ed., 145; and parties nominally different may be, in legal effect, the same." *Chicago, R. I. & P. Ry.* v. *Schendel,* 270 U. S. 611, 620.

The answer to appellant's contention may be briefly stated: Both the Collector and the Coal Commission are agencies of the United States Government. As the decided cases which we shall herein-

fter discuss show, when an issue has been adjudi-
ated in litigation between a party and one of these
gencies, it cannot be relitigated in a suit against
he other agency. This doctrine was applied to the
resent case by the court below in the following
anguage (R. 38):

> The "tax," if any is due or enforceable, is due to the United States. To the extent that the Commission has been entrusted with powers affecting the "tax" therefor, it is an agency of the United States, and to the extent that powers have been conferred upon the Collector and his superior officers, they are also agencies of the United States. It results from the paramount and sole interest of the United States that when a valid determination has been made between a party and an officer or agency of the United States in official capacity, it is conclusive between the party and any other officer of the government authorized as an agency of the government in respect to the same matter.

It will be helpful to an understanding of the
roblem to state briefly the relationship between
he Coal Commission and the Commissioner of In-
ernal Revenue in the administration of the Act.
he Commissioner is, of course, merely the agency
o collect the taxes levied by the Act in order to
ffectuate the regulatory program. The 19½% tax
pplies only to the sale or disposal of coal "which
ould be subject to the application of the condi-
ons and provisions of the code provided for in

ection 4, or of the provisions of section 4–A." The Commissioner does not determine what coal is xempt from the code provisions of the Act, and ecordingly from the 19½% tax. The Coal Commission performs this function. Whether the Coal Commission determines that the sale of coal is, or is ot, within the purview of the Act (e. g., because the oal is sold in purely intrastate commerce or is not "bituminous"), it certifies this determination to he Commissioner, who follows it as to the 19½% ax. Similarly, if a coal producer joins the Code, he Coal Commission certifies that fact to the Commissioner, and the Commissioner may not thereafter assess or collect the 19½% tax (Section 3 b)); or if a producer files an application for xemption under Section 4–A of the Act, entitling im to an exemption during the pendency of the pplication, the Coal Commission certifies that fact o the Commissioner who then refrains from further action as to the 19½% tax until the application is finally disposed of by the Coal Commission. This has been the constant practice of the National Bituminous Coal Commission, its successor, the Bituminous Coal Division of the Department of Interior, and the Bureau of Internal Revenue.

Determinations as to the scope of the provisions f the Act, and therefore the applicability of the ax, are made by the Coal Commission, and the ommission acts upon certifications from the Commission. Appellant recognized this by filing its ap-

lication for exemption with the Coal Commission, ne agency which the statute clothes with authority o make determinations as to the status of coal. Having exhausted its remedy against the agency of ne government which has the power to make such eterminations, however, it now seeks to relitigate ne issues against another agency of the govern- ent which performs a ministerial function, sub- rdinate in respect of these matters to the Coal ommission. Appellant cannot and does not deny at it has received a full and complete hearing as o its contentions, before both the Coal Commission nd the courts; and there is no reason for it to sup- ose that another long process of litigation will ield a different result. The most that it can hope is that, by prolonging this controversy, it will be ble to secure for itself court orders relieving it rom the taxes lawfully due, during the pendency f repetitious litigation.

Many cases establish the doctrine that there is rivity between officers of the same government, nd that a judgment in a suit between a party and n officer or agency of a state or of the United tates precludes relitigation of the identical ques- on between that party and another officer of ne same government. *New Orleans* v. *Citizens' ank,* 167 U. S. 371, 388–389; *Bank of Kentucky Stone,* 88 Fed. 383, 395 (C. C. D. Ky.), affirmed y a divided Court, 174 U. S. 799; *Gunter* v. *At- ntic Coast Line Railroad Company,* 200 U. S.

273, 284; *Tait* v. *Western Maryland Railway Company*, 289 U. S. 620, 626; *Royal Oak Township* v. *County of Oakland*, 269 Mich. 153, 256 N. W. 837;[34] *Carroll* v. *Fullerton*, 215 Ky. 558, 286 S. W. 847; *Commonwealth* v. *Harkness' Admr.*, 181 Ky. 709, 205 S. W. 787; *Bernhard* v. *Wall*, 184 Cal. 612, 194 Pac. 1040; *Ward* v. *Field Museum of Natural History*, 241 Ill. 496, 89 N. E. 731; 15 R. C. L. 1029.

In *Gunter* v. *Atlantic Coast Line*, *supra*, a judgment against certain county treasurers was held binding upon their successors in office and also upon the Attorney General of the state. In *Bank of Kentucky* v. *Stone*, *supra*, a Circuit Court com-

[34] In *Royal Oak Township* v. *County of Oakland*, *supra*, the Michigan Supreme Court stated (p. 156): "The general rule is that a judgment for or against a State or municipal officer or agency in matters as to which they are entitled to represent the city or state in litigation is conclusive for or against the city or state and their other agencies. It is conclusive upon other officers of the governmental body represented in the first action as well as upon successors in office. 1 Freeman, *Judgments* (5th ed.) § 509; *State* v. *Sparrow*, 89 Mich. 263; *People, ex rel. Attorney General* v. *Railway Co.*, 157 Mich. 144; *Green* v. *Leoni Township Board*, 224 Mich. 498; *Skinner* v. *Argentine Township Board*, 238 Mich. 533; *People, ex rel. Bryant*, v. *Holladay*, 93 Cal. 241 (29 P. 54, 27 Am. St. Rep. 186); *Bernhard* v. *Wall*, 184 Cal. 612 (194 Pac. 10, 40); *Blondel* v. *Woodbury County*, 203 Iowa 1099 (212 N. W. 335); *Conover* v. *Mayor of New York*, 25 Barb. (N. Y.) 513; *Lighton* v. *City of Syracuse*, 188 N. Y. 499 (81 N. E. 464), dictum; *Ohio Fuel Gas Co.* v. *City of Mt. Vernon*, 37 Ohio App. 139 (174 N. E. 260); *Commonwealth* v. *Harkness' Adm'r*, 181 Ky. 709 (205 S. W. 787); *Harrison* v. *City of Fall River*, 257 Mass. 545 (154 N. E. 255)."

osed of Justice Harlan and Judges Taft and Lur-
on held that judgments in cases against a county
nd city were binding upon the state board of valu-
tion and assessment on the ground that the parties
ere in privity. In *New Orleans* v. *Citizens' Bank, supra,* judgments against government officers
ere held binding upon their successors in office.
nd recently in *Tait* v. *Western Maryland Railway Company, supra,* this Court held (p. 627) that
question adjudicated between a taxpayer and the
overnment through its agent, the Commissioner
f Internal Revenue, was binding upon a Collector
f Internal Revenue because he was "in such privy with them that he is estopped by the judgment."
It has been held that technically a judgment in
suit against a Collector of Internal Revenue is
ot *res judicata* against the United States.[35]
lowever, although a judgment entered in a case
gainst a Collector may not be binding in a suit
gainst the United States, a judgment in an action
gainst the United States or its representative is
onclusive in a suit against a Collector. Where
a question has been adjudged as between a taxayer and the Government or its official agent, the
ommissioner, the Collector, being an official in-

[35] *Bankers Pocahontas Coal Co.* v. *Burnet*, 287 U. S. 308, 1; *Sage* v. *United States*, 250 U. S. 33; *Bank of Kentucky* v. *Kentucky*, 207 U. S. 258. This result is a consequence of e historical justification for the suit against the Collector, hen suit could not be maintained at all if the Collector were ewed as standing in the place of the Government. Cf. *oore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 383.

ferior in authority, and acting under them, is in such privity with them that he is estopped by the judgment." *Tait* v. *Western Maryland Railway Company*, 289 U. S. 620, at 627. The significant factor in the *Tait* case was not the relationship between the Collector and the Commissioner but the relationship of both of them to the Government.[36]

The test is whether the Government has consented to be sued itself or to be represented by a particular officer or agent. If it has, the judgment is binding upon it and its other officials. *A fortiori*, the adverse party to the suit who remains the same in form as well as in fact is bound by the judgment.

Application of these principles to the case at bar demonstrates that the decision in the proceeding against the National Bituminous Coal Commission in the Circuit Court of Appeals is conclusive here. The Commission is an agency of the Government; indeed, it is a part of the Government. In Section 6 (b) of the Coal Act, Congress consented that the Government, through the Commission as its agent and representative, be sued in certain kinds of proceedings. The judgment as to such matters under the Coal Act binds the Government itself, and necessarily also is conclusive upon its subordinate officials and the adverse party to the litigation.

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[36] See *Gunter* v. *Atlantic Coast Line Co.*, *supra*; *Bank of Kentucky* v. *Stone*, *supra*, where the officials bound by the prior judgments were not subordinate or inferior to the officials against whom the judgments had been entered.

Should the Court give its approval to appellant's position, it will open the door to continued relitigation of points decided in controversies with other administrative agencies. In a great number of statutes enforcement duties are placed upon both the Department or agency involved and upon the Attorney General. Thus, appeals from orders of the Federal Power Commission could be carried through to final decision by this Court and the same issues litigated once again by the same parties in a suit against the Attorney General. And in cases arising under the Utility Holding Company Act, where certain duties of enforcement are imposed upon both the Attorney General and the Postmaster General, a party could have a final determination of the same issue three times, by first appealing from the decision of the Securities and Exchange Commission and then bringing separate suits against the Attorney General and the Postmaster General in turn. The requirements of orderly judicial administration clearly do not contemplate or permit any such result.

3. *Identity of Issues.*—Appellant asserts that the "subject matter" is not the same in the two suits (Br., p. 16), that the former proceeding involved exemption from regulation, whereas the present suit involves tax liability. At most this distinction shows that the two suits involve different causes of action or claims; although in such a situa-

tion adjudication of the first cause is not an absolute bar to the second litigation it does preclude relitigation of any point or question which was litigated and determined in the first suit. *Cromwell* v. *County of Sac,* quoted p. 50, *supra; United States* v. *Moser,* 266 U. S. 236, 242; *Tait* v. *Western Maryland Ry. Co., supra.* In the former proceeding the ultimate point determined was that appellant's coal was "bituminous" within the meaning of Section 17 (b) of the Bituminous Coal Act. In the present suit appellant is seeking to raise precisely the same question.

That the issues in the two cases are identical is disclosed by a comparison of the application for exemption filed with the National Bituminous Coal Commission (Vol. II, R. 4–4F) with the allegations of the complaint in this case (R. 4). Furthermore, much of the evidence offered by the appellant in this proceeding to prove that its coal was not bituminous was identical with that received in evidence before the Commission (cf. Vol. I, R. 86 and Vol. II, R. 25–30; Vol. I, R. 88–92 and Vol. II, R. 10–16), and the rest of the evidence offered was similar in content and largely cumulative. (Vol. I, R. 71–85, 93–104, 109–112). Under these circumstances the finding of fact by the District Court that the question determined in the proceeding before the Circuit Court of Appeals "is identical with the question presented in 'paragraph

one of the complaint filed in this case" is plainly correct.[37]

4. *Jurisdiction.*—Appellant asserts as a general proposition (Br., p. 14) that the doctrine of *res judicata* does not apply unless the court rendering the judgment has jurisdiction of the cause. However, the Circuit Court of Appeals expressly passed upon the question of the Commission's jurisdiction, and this Court has repeatedly declared that, at least when a jurisdictional question is presented and decided,[38] "The principles of *res judicata* apply to questions of jurisdiction as well as to other issues." *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66, 78; *American Surety Company* v. *Baldwin*, 287 U. S. 156, 166; *Stoll* v. *Gottlieb*, 305 U. S. 165, 171–172; *Chicot County Drainage District* v. *Baxter State Bank*, No. 122, this Term, decided January 2, 1940; *Baldwin* v. *Travelling Men's Association*, 283

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[37] Circuit Judge Woodrough, who delivered the opinion for the Circuit Court of Appeals, presided at the trial in the District Court (Vol. II, R. 378, Vol. I, R. 51–52).

[38] A decision may be *res judicata* on jurisdictional issues as well as others even when the jurisdictional question is not raised or passed upon, e. g. *Chicot County Drainage District* v. *Baxter State Bank*, No. 122, this Term, decided January 2, 1940. Under special circumstances, however, where the jurisdictional question is not raised or passed on, a judgment will not be regarded as *res judicata* with respect to the first court's jurisdiction and may be subject to collateral attack, e. g., *United States* v. *Fidelity and Guaranty Co.*, No. 569, this Term, decided March 25, 1940; *Kalb* v. *Feuerstein*, No. 120, this Term, decided January 2, 1940. The instant case does not present such a problem.

U. S. 522. The reasons for this rule, as summarized in this Court's opinion in *Stoll* v. *Gottlieb*, are as follows (p. 172):

> * * * After a federal court has decided the question of the jurisdiction over the parties as a contested issue, the court in which the plea of *res judicata* is made has not the power to inquire again into that jurisdictional fact. We see no reason why a court, in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties, did have jurisdiction of the subject matter of the litigation.
>
> * * * * * * *
>
> * * * After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first.

B. THE DISTRICT COURT HAD NO JURISDICTION TO DETERMINE THE STATUS OF APPELLANT'S COAL

Even if there had been no decision determining the status of appellant's coal under the Act, the existence of an adequate and complete statutory

remedy would have prevented the District Court from deciding that question.

The jurisdiction of courts of equity has always been limited to cases where there is no adequate remedy at law. See c. 20, 1 Stat. 82, 28 U. S. C. Sec. 384. This basic principle of equity jurisdiction reinforces the familiar doctrine that a court will not undertake to dispose of an issue when an adequate administrative and statutory remedy has not been exhausted. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, and cases cited therein. When such remedies have been availed of not only before the administrative body but in a circuit court of appeals and in this Court, the inability of the District Court to grant injunctive relief is even more patent.

These considerations are reinforced by express language in the Bituminous Coal Act, vesting in the circuit courts of appeals exclusive jurisdiction to review orders of the National Bituminous Coal Commission. Section 6 (b) provides that when a person aggrieved by a Commission order files a petition for review in a Circuit Court of Appeals "Upon the filing of such transcript, such court shall have exclusive jurisdiction to affirm, modify, and enforce or set aside such order, in whole or in part." That Congress intended this remedy to be exclusive is further demonstrated by an additional

provision in the Act which provides, apparently out of an abundance of caution, that (Section 6 (d)):

> The jurisdiction of the Circuit Court of Appeals of the United States or the United States Court of Appeals for the District of Columbia, as the case may be, to enforce, set aside, or modify orders of the Commission shall be exclusive.

Congress has the power to create a special procedure to safeguard the rights of citizens and to make the remedy thus established an exclusive one. *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, is directly in point. The procedure established for the recovery of processing taxes was there held to deprive the district courts of jurisdiction to entertain suits for refund against the Collectors of Internal Revenue. For the same reason, the District Court was without jurisdiction here.

It cannot be seriously contended that the statutory remedy under the Coal Act is inadequate. The procedure prescribed is similar to that contained in many regulatory statutes.[39] Section 4–A of the Coal Act contains a special guarantee of immunity for the period during which the application for exemption is before the Commission. Appel-

[39] Cf. Federal Trade Commission Act, as amended by Act of June 23, 1938, c. 601, 52 Stat. 1028, 15 U. S. C. Supp. V, Sec. 45; Securities Act of 1933, c. 38, 48 Stat. 80, 15 U. S. C. Sec. 77i.

lant's real grievance is not that the remedy was inadequate but that it lost the case.

Scant reference need be made to any argument that appellant had no such administrative remedy because the Commission lacked jurisdiction to determine whether particular coals are subject to the Act. Appellant itself invoked and exhausted this statutory remedy, and the decision in the former proceedings demonstrate that the remedy was an appropriate one. The question of whether the Commission had jurisdiction was fully considered by the Circuit Court of Appeals in *Sunshine Anthracite Coal Co.* v. *National Bituminous Coal Commission.* A detailed statement of the reasons supporting the Commission's jurisdiction may be found in the opinion in that case (105 F. (2d) 559, Vol. II, R. 381–388) and in the Government's brief in opposition to certiorari on file in this Court (No. 410, this Term).

For the reasons fully set forth in the opinion of the Circuit Court of Appeals, we submit that the National Bituminous Coal Commission had jurisdiction to determine the status of appellant's coal, subject to review by the Circuit Court of Appeals, and that the District Court was without jurisdiction to inquire into that question. As the court below well said (R. 34):

> * * * By the terms of the Act it conferred jurisdiction on the Commission to

make the determination and the procedure provided for and followed by the Commission accorded to the plaintiff a full and fair hearing and a review in the Circuit Court of Appeals which satisfied all constitutional requirements as to determination of the fact question of the plaintiff's status in respect to the administration of the Act. The nature of the fact question as it would arise in many different parts of the country practically necessitated delegation of the power to make determination to some such national body as the Coal Commission and precluded committing it to the outcome of individual law suits in many courts.

V.

Appellant Is Not Entitled to Permanent Injunctive Relief Against Taxes Accruing After December 4, 1939

Appellant invokes the doctrine of *Ex parte Young*, 209 U. S. 123, in an effort to obtain permanent immunity from the payment of all taxes accruing before the termination of this litigation.

That case neither held nor indicated that the operation of all statutes imposing heavy penalties must invariably be stayed until after their validity has finally been passed on by this Court. The doctrine has been limited in the main to litigation "where the validity of the act depends upon the existence of a fact which can be determined only

fter investigation of a very complicated and tech-
ical character." It does not apply to "the ordi-
ary case of a statute upon a subject requiring no
uch investigation and over which the jurisdiction
f the legislature is complete in any event" (*Ex
arte Young*, 209 U. S., at 148). Moreover, the doc-
rine of necessity must be limited to statutes and
dministrative orders of doubtful validity. Other-
vise, dilatory tactics could postpone for long
eriods the effective date of all laws and orders
nforced by penalties.

Here, appellant has been granted permanent
rotection against taxes accruing up to December
, 1939. Since that date, no extensive investiga-
ion of facts pertinent to the validity of the Act has
een required or made. In the light of recent cases
(*United States* v. *Rock Royal Co-operative, Inc.*,
07 U. S. 533), the subject of the legislation was
learly one over which the jurisdiction of Congress
vas complete. In *Mulford* v. *Smith*, 307 U. S. 38,
nd *Hood & Sons* v. *United States*, 307 U. S. 588,
t was recognized that the appropriate procedure
vas to afford protection *pendente lite* through re-
uiring the deposit of sums due under the stat-
te in the registry of the court. In the light of
ll the facts and circumstances of this case, the
District Court concluded that appellant would be
iven all the protection to which it was entitled by
permanent injunction against the collection of
axes for the period ending on December 4, 1939,

the date of this Court's final denial of certiorari in the prior litigation. We submit that the discretion of the lower court in this respect was properly exercised and should not be disturbed.

CONCLUSION

For the above reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

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[PUBLIC—No. 48—75TH CONGRESS]
[CHAPTER 127—1ST SESSION]
[H. R. 4985]

AN ACT

To regulate interstate commerce in bituminous coal, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That regulation of the sale and distribution in interstate commerce of bituminous coal is imperative for the protection of such commerce; that there exist practices and methods of distribution and marketing of such coal that waste the coal resources of the Nation and disorganize, burden, and obstruct interstate commerce in bituminous coal, with the result that regulation of the prices thereof and of unfair methods of competition therein is necessary to promote interstate commerce in bituminous coal and to remove burdens and obstructions therefrom.

NATIONAL BITUMINOUS COAL COMMISSION

SEC. 2. (a) There is hereby established in the Department of the Interior a National Bituminous Coal Commission (herein referred to as Commission), which shall be composed of seven members appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The Commission shall annually designate its chairman, and shall have a seal which shall be judicially recognized. Any person appointed to fill a vacancy shall be appointed only for the unexpired term of his predecessor in office. The Commission shall have an office in the city of Washington, District of Columbia, and shall convene at such times and places as the majority of the Commission shall determine. Two members of the Commission shall have been experienced bituminous coal mine workers, two shall have had previous experience as producers, but none of the members shall have any financial interest, direct or indirect, in the mining, transportation, or sale of, or manufacture of equipment for, coal (whether or not bituminous coal), oil, or gas, or in the generation, transmission, or sale of hydro-electric power, or in the manufacture of equipment for the use thereof, and shall not actively engage in any other business, vocation, or employment. Not more than one commissioner shall be a resident of any one State, and not more than one commissioner shall be a resident of any one of the districts hereinafter established, but a change in any of the boundaries of the districts, made by the Commission as hereinafter provided, shall not affect the tenure of office of any commissioner then serving. Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. The Commission is authorized to appoint and fix the compensation and duties of a secretary and necessary professional, clerical, and other assistants. With the exception of the secretary, a clerk to each commissioner, the attorneys, the managers and employees of the statistical

ureaus hereinafter provided for, and such special agents, technical xperts, and examiners as the Commission may require, all employees f the Commission shall be appointed and their compensation fixed n accordance with the provisions of the civil-service laws and the lassification Act of 1923, as amended. No person appointed with- ut regard to the provisions of the civil-service laws shall be related o any member of the Commission by marriage or within the third egree by blood. The Commission is authorized to accept and utilize oluntary and uncompensated services of any person or of any official f a State or political subdivision thereof. The members of the ommission shall each receive compensation at the rate of $10,000 er year and necessary traveling expenses. Such Commission shall ave the power to make and promulgate all reasonable rules and regu- tions for carrying out the provisions of this Act and shall annually ake full report of its activities to the Secretary of the Interior for ransmission to Congress. A majority of the Commission shall con- itute a quorum for the transaction of business, and a vacancy in the ommission shall not impair the right of the remaining members to xercise all the power of the Commission. No order which is sub- ect to judicial review under section 6, and no rule or regulation hich has the force and effect of law, shall be made or prescribed by he Commission, unless it has given reasonable public notice of a earing, and unless it has afforded to interested parties an oppor- unity to be heard, and unless it has made findings of fact. Such ndings, if supported by substantial evidence shall be conclusive upon eview thereof by any court of the United States. The Commission ay establish divisions, each of which divisions shall consist of not ss than three of its members, as it may deem necessary for the roper dispatch of its business. Each such division shall exercise l the powers and authority of the Commission in the premises: *rovided*, That any person in interest may, upon written petition, cure a review by the Commission of the report, finding, or order such division. The Commission may by its order assign or refer y matter within its jurisdiction under this Act to an individual ommissioner, to a board composed of employees of the Commission, to an examiner, to be designated by such order, for hearing and e recommendation of an appropriate order in the premises. Each dividual Commissioner, board, or examiner, when so directed by der of the Commission, shall have power to administer oaths and irmations, to examine witnesses, and receive evidence. The Com- ission is authorized to make contracts for personal services in the istrict of Columbia and elsewhere and to establish and maintain ch offices throughout the United States as it deems necessary for e effective administration of this Act, but shall maintain its prin- al office in the District of Columbia.

The Commission is hereby authorized to initiate, promote, and nduct research designed to improve standards and methods used the mining, preparation, conservation, distribution, and utilization coal and the discovery of additional uses for coal, and for such rposes shall have authority to assist educational, governmental, d other research institutions in conducting research in coal, and to such other acts and things as it deems necessary and proper to omote the use of coal and its derivatives.

(b) (1) There is hereby established an office in the Department of the Interior to be known as the office of the consumers' counsel of the National Bituminous Coal Commission. The office shall be in charge of a counsel to be appointed by the President, by and with the advice and consent of the Senate. The counsel shall have no financial interest, direct or indirect, in the mining, transportation, or sale of, or the manufacture of equipment for, coal (whether or not bituminous coal), oil, or gas, or in the generation, transmission, or sale of hydroelectric power, or in the manufacture of equipment for the use thereof, and shall not actively engage in any other business, vocation, or employment. The counsel shall receive compensation, at the rate of $10,000 per year and necessary traveling expenses.

(2) It shall be the duty of the counsel to appear in the interest of the consuming public in any proceeding before the Commission and to conduct such independent investigation of matters relative to the coal industry and the administration of this Act as he may deem necessary to enable him properly to represent the consuming public in any proceeding before the Commission. In any such proceeding before the Commission, the counsel shall have the right to offer any relevant testimony and argument, oral or written, and to examine and cross-examine witnesses and parties to the proceeding, and shall have the right to have subpena or other process of the Commission issue in his behalf. Whenever the counsel finds that it is in the interest of the consuming public to have the Commission furnish any information at its command or conduct any investigation as to any matter within its authority, the counsel shall so certify to the Commission, specifying in the certificate the information or investigation desired. Thereupon the Commission shall promptly furnish to the counsel the information or promptly conduct the investigation and place the results thereof at the disposal of the counsel.

(3) The counsel is authorized to appoint and fix the compensation and duties of necessary professional, clerical, and other assistants. With the exception of a clerk to the counsel, the attorneys, and such special agents and experts as the counsel may from time to time find necessary for the conduct of his work, all employees of the counsel shall be appointed and their compensation fixed in accordance with the civil-service laws and the Classification Act of 1923, as amended. The counsel is authorized to make such expenditures as may be necessary for the performance of the duties vested in him.

(4) The counsel shall annually make a full report of the activities of his office directly to the Congress.

TAX ON COAL

SEC. 3. (a) There is hereby imposed upon the sale or other disposal of bituminous coal produced within the United States when sold or otherwise disposed of by the producer thereof an excise tax of 1 cent per ton of two thousand pounds.

The term "disposal" as used in this section includes consumption or use (whether in the production of coke or fuel, or otherwise) by a producer, and any transfer of title by the producer other than by sale.

(b) In addition to the tax imposed by subsection (a) of this section, there is hereby imposed upon the sale or other disposal of bituminous coal produced within the United States, when sold

or otherwise disposed of by the producer thereof, which would be subject to the application of the conditions and provisions of the code provided for in section 4, or of the provisions of section 4-A, an excise tax in an amount equal to 19½ per centum of the sale price at the mine in the case of coal disposed of by sale at the mine, or in the case of coal disposed of otherwise than by sale at the mine, and coal sold otherwise than through an arms' length transaction, 19½ per centum of the fair market value of such coal at the time of such disposal or sale. In the case of any producer who is a code member as provided in section 4 and is so certified to the Commissioner of Internal Revenue by the Commission, the sale or disposal by such producer during the continuance of his membership in the code of coal produced by him shall be exempt from the tax imposed by this subsection.

(c) The taxes imposed by this section shall be paid to the United States by the producer, and shall be payable monthly for each calendar month on or before the first business day of the second succeeding month, under such regulations and in such manner as shall be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury.

(d) In the case of coal disposed of otherwise than by sale at the mine, and coal sold otherwise than through an arms' length transaction, the Commissioner of Internal Revenue shall determine the market value thereof. Such market value shall equal the current market price at the mine of coal of a comparable kind, quality, and size produced for market in the locality where the coal so disposed of is produced.

(e) The tax imposed by subsection (a) of this section shall not apply in the case of a sale of coal for the exclusive use of the United States or of any State or Territory of the United States or the District of Columbia, or any political subdivision of any of them, for use in the performance of governmental functions. Under regulations prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, a credit against the tax imposed by subsection (a) of this section or a refund may be allowed or made to any producer of coal in the amount of such tax paid with respect to the sale of coal to any vendee, if the producer has in his possession such evidence as the regulations may prescribe that such coal was resold by any person for the exclusive use of the United States or of any State, Territory of the United States, or the District of Columbia, or any political subdivision of any of them, for use in the performance of governmental functions.

(f) No producer shall, by reason of his acceptance of the code provided for in section 4, or of the exemption from the tax provided in subsection (b) in this section, be held to be precluded or estopped from contesting the constitutionality of any provision of this Act or of the code, or the validity or application of either to him or to any part of the coal produced by him.

BITUMINOUS COAL CODE

SEC. 4. The provisions of this section shall be promulgated by the Commission as the "Bituminous Coal Code", and are herein referred to as the code.

Producers accepting membership in the code as provided in section 5 (a) shall be, and are herein referred to as, code members, and the provisions of such code shall apply only to such code members, except as otherwise provided by subsection (h) of part II of this section.

For the purpose of carrying out the declared policy of this Act, the code shall contain the following conditions and provisions, which are intended to regulate interstate commerce in bituminous coal and which shall be applicable only to matters and transactions in or directly affecting interstate commerce in bituminous coal:

PART I—ORGANIZATION

(a) Twenty-three district boards of code members shall be organized. Each district board shall consist of not less than three nor more than seventeen members. The number of members of the district board shall, subject to the approval of the Commission, be determined by the majority vote of the district tonnage during the calendar year 1936 represented at a meeting of the code members of the district called for the purpose of such determination and for the election of such district board; and all code members within the district shall be given notice of the time and place of the meeting. All but one of the members of the district board shall be code members or representatives of code members truly representative of all the mines of the district. The number of such producer members shall be an even number. One-half of such producer members shall be elected by the majority in number of the code members of the district represented at the aforesaid meeting. The other producer members shall be elected by votes cast in the proportion of the annual tonnage output of the code members in the district, for the calendar year preceding the date of the election: *Provided*, That not more than one officer or employee of any code member within a district shall be a member of the district board at the same time. The remaining member of each district board shall be selected by the organization of employees representing the preponderant number of employees in the industry of the district in question. The term of district board members shall be two years and until their successors are elected. The Commission shall have power to remove any member of any district board upon its finding, after due notice and hearing, that said member is guilty of inefficiency, willful neglect of duty, or malfeasance in office.

The district boards shall have power to adopt bylaws and rules of procedure, subject to approval of the Commission, and to appoint officers from within or without their own membership, to fix their terms and compensation, to provide for reports, and to employ such committees, employees, arbitrators, and other persons necessary to effectuate their purposes. Members of the district board shall serve, as such, without compensation but may be reimbursed for their reasonable expenses. The territorial boundaries or limits of the twenty-three districts are set forth in the schedule entitled "Schedule of Districts" and annexed to this Act.

Whenever the Commission upon investigation instituted upon its own motion or upon petition of any code member, district board, State or political subdivision thereof, or the consumers' counsel, after

hearing finds that the territorial boundaries or limits of any district or minimum-price area are such as to make it substantially impracticable to establish minimum prices in accordance with all the standards set forth in subsections (a) and (b) of part II of this section, and that a change in such territorial boundaries or limits or a division or consolidation of such districts or minimum-price areas would render the establishment of minimum prices in accordance with all such standards more practicable, it shall by order make such changes, divisions, and consolidations as it finds will substantially aid in such establishment of minimum prices.

(b) The expense of administering the code by the respective district boards shall be borne by the code members in the respective districts, each paying his proportionate share, as assessed, computed on a tonnage basis, in accordance with regulations prescribed by such boards with the approval of the Commission. Such assessments may be collected by the district board by action in any court of competent jurisdiction.

(c) Nothing contained in this Act shall constitute the members of a district board partners for any purpose. Nor shall any member of a district board or officer thereof be liable in any manner to anyone for any act of any other member, officer, agent, or employee of the district board. Nor shall any member or officer of a district board, exercising reasonable diligence in the conduct of his duties under this Act, be liable to anyone for any action or omission to act under this Act except for his own willful misfeasance or for nonfeasance involving moral turpitude.

(d) No action complying with the provisions of this section taken while this Act is in effect, or within sixty days thereafter, by any code member or by any district board, or officer thereof, shall be construed to be within the prohibitions of the antitrust laws of the United States.

Part II—Marketing

The Commission shall have power to prescribe for code members minimum and maximum prices, and marketing rules and regulations, as follows:

(a) All code members shall report all spot orders to such statistical bureau hereinafter provided for as may be designated by the Commission and shall file with it copies of all contracts for the sale of coal, copies of all invoices, copies of all credit memoranda, and such other information concerning the preparation, cost, sale, and distribution of coal as the Commission may authorize or require. All such records shall be held by the statistical bureau as the confidential records of the code member filing such information.

For each district there shall be established by the Commission a statistical bureau which shall be operated and maintained as an agency of the Commission. Each statistical bureau shall be under the direction of a manager, who shall be appointed by the Commission. No producer, employee, or representative of a producer, and, except as the Commission may specifically approve, no member of a district board or employee or representative thereof shall be an employee of any statistical bureau.

Each district board shall, from time to time on its own motion or when directed by the Commission, propose minimum prices free on board transportation facilities at the mines for kinds, qualities, and sizes of coal produced in sa district, and classification of coal and price variations as to min , consuming market areas, values as to uses and seasonal demand. Said prices shall be proposed so as to yield a return per net ton for each district in a minimum price area, as such districts are identified and such area is defined in the subjoined table designated "minimum-price-area table", equal as nearly as may be to the weighted average of the total costs, per net ton, determined as hereinafter provided, of the tonnage of such minimum price area. The computation of the total costs shall include the cost of labor, supplies, power, taxes, insurance, workmen's compensation, royalties, depreciation and depletion (as determined by the Bureau of Internal Revenue in the computation of the Federal income tax) and all other direct expenses of production, coal operators' association dues, district board assessments for Board operating expenses only levied under the code, and reasonable costs of selling and the cost of administration.

MINIMUM-PRICE-AREA TABLE

Area 1: Eastern Pennsylvania, district 1; western Pennsylvania, district 2; northern West Virginia, district 3; Ohio, district 4; Michigan, district 5; Panhandle, district 6; Southern numbered 1, district 7; Southern numbered 2, district 8; that part of Southeastern district 13, comprising Van Buren, Warren, and McMinn Counties in Tennessee.

Area 2: West Kentucky, district 9; Illinois, district 10; Indiana, district 11; Iowa, district 12.

Area 3: Southeastern, district 13, except Van Buren, Warren, and McMinn Counties in Tennessee.

Area 4: Arkansas-Oklahoma, district 14.

Area 5: Southwestern, district 15.

Area 6: Northern Colorado, district 16; southern Colorado, district 17; New Mexico, district 18.

Area 7: Wyoming, district 19; Utah, district 20.

Area 8: North Dakota and South Dakota, district 21.

Area 9: Montana, district 22.

Area 10: Washington and Alaska, district 23.

The minimum prices so proposed shall reflect, as nearly as possible, the relative market value of the various kinds, qualities, and sizes of coal, shall be just and equitable as between producers within the district, and shall have due regard to the interests of the consuming public. The procedure for proposal of minimum prices shall be in accordance with rules and regulations to be approved by the Commission.

A schedule of such proposed minimum prices, together with the data upon which they are computed, including, but without limitation, the factors considered in determining the price relationship, shall be submitted by the district board to the Commission, which may approve, disapprove, or modify such proposed minimum prices to conform to the requirements of this subsection, which shall serve

as the basis for the coordination provided for in the succeeding subsection (b): *Provided*, That all minimum prices proposed for any kind, quality, or size of coal for shipment into any consuming market area shall be just and equitable as between producers within the district: *And provided further*, That no minimum price shall be proposed that permits dumping.

As soon as possible after its creation, each district board shall determine, from cost data submitted by the proper statistical bureau of the Commission, the weighted average of the total costs of the ascertainable tonnage produced in the district in the calendar year 1936. The district board shall adjust the average costs so determined, as may be necessary to give effect to any changes in wage rates, hours of employment, or other factors substantially affecting costs, exclusive of seasonal changes, so as to reflect as accurately as possible any change or changes which may have been established since January 1, 1936. Such determination and the computations upon which it is based shall be promptly submitted to the Commission by each district board in the respective minimum-price area. The Commission shall thereupon determine the weighted average of the total costs of the tonnage for each minimum-price area in the calendar year 1936, adjusted as aforesaid, and transmit it to all the district boards within such minimum-price area. Said weighted average of the total costs shall be taken as the basis, to be effective until changed by the Commission, for the proposal and establishment of minimum prices. Thereafter, upon satisfactory proof made at any time by any district board of a change in excess of 2 cents per net ton of two thousand pounds in the weighted average of the total costs in the minimum-price area, exclusive of seasonal changes, the Commission shall increase or decrease the minimum prices accordingly. The weighted average figures of total cost determined as aforesaid shall be available to the public.

Each district board shall, on its own motion or when directed by the Commission, propose reasonable rules and regulations incidental to the sale and distribution, by code members within the district, of coal. Such rules and regulations shall not be inconsistent with the requirements of this section and shall conform to the standards of fair competition hereinafter established. Such rules and regulations shall be submitted by the district board to the Commission with a statement of the reasons therefor, and the Commission may approve, disapprove, or modify the same, for the purpose of coordination.

(b) District boards shall, under rules and regulations established by the Commission, coordinate in common consuming market areas upon a fair competitive basis the minimum prices and the rules and regulations proposed by them, respectively, under subsection (a) hereof. Such coordination, among other factors, but without limitation, shall take into account the various kinds, qualities, and sizes of coal, and transportation charges upon coal. All minimum prices proposed for any kind, quality, or size of coal for shipment into any common consuming market area shall be just and equitable, and not unduly prejudicial or preferential, as between and among districts, shall reflect, as nearly as possible, the relative market values, at points of delivery in each common consuming market area, of the various kinds, qualities, and sizes of coal produced

in the various districts, taking into account values as to uses, seasonal demand, transportation methods and charges and their effect upon a reasonable opportunity to compete on a fair basis, and the competitive relationships between coal and other forms of fuel and energy; and shall preserve as nearly as may be existing fair competitive opportunities. The minimum prices proposed as a result of such coordination shall not, as to any district, reduce or increase the return per net ton upon all the coal produced therein below or above the minimum return as provided in subsection (a) of this section by an amount greater than necessary to accomplish such coordination, to the end that the return per net ton upon the entire tonnage of the minimum price area shall approximate the weighted average of the total cost per net ton of the tonnage of such minimum price area. Such coordinated prices and rules and regulations, together with the data upon which they are predicated, shall be submitted to the Commission. The Commission shall thereupon establish, and from time to time, upon complaint or upon its own motion, review and revise the effective minimum prices and rules and regulations in accordance with the standards set forth in subsections (a) and (b) of part II of this section.

(c) When, in the public interest, the Commission deems it necessary to establish maximum prices for coal in order to protect the consumer of coal against unreasonably high prices therefor, the Commission shall have the power to establish maximum prices free on board transportation facilities for coal in any district. Such maximum prices shall be established at a uniform increase above the minimum prices in effect within the district at the time, so that in the aggregate the maximum prices shall yield a reasonable return above the weighted average total cost of the district: *Provided*, That no maximum price shall be established for any mine which shall not yield a fair return on the fair value of the property.

(d) If any code member or district board or member thereof, or any State or political subdivision of a State, or the consumers' counsel, shall be dissatisfied with such coordination of prices or rules and regulations, or by a failure to establish such coordination of prices or rules and regulations, or by any minimum or maximum prices established pursuant to subsections (b) or (c) of part II of this section, he or it shall have the right, by petition, to make complaint to the Commission, and the Commission shall, under rules and regulations established by it, and after notice and hearing, make such order as may be required to effectuate the purpose of subsections (b) and (c) of part II of this section. Pending final disposition of such petition, and upon reasonable showing of necessity therefor, the Commission may make such preliminary or temporary order as in its judgment may be appropriate, and not inconsistent with the provisions of this Act.

(e) No coal subject to the provisions of this section shall be sold or delivered or offered for sale at a price below the minimum or above the maximum therefor established by the Commission, and the sale or delivery or offer for sale of coal at a price below such minimum or above such maximum shall constitute a violation of the code: *Provided*, That the provisions of this paragraph shall not apply to a

lawful and bona fide written contract entered into prior to June 16, 1933.

The making of a contract for the sale of coal at a price below the minimum or above the maximum therefor established by the Commission at the time of the making of the contract shall constitute a violation of the code, and such contract shall be invalid and unenforceable.

From and after the date of approval of this Act, until prices shall have been established pursuant to subsections (a) and (b) of part II of this section, no contract for the sale of coal shall be made providing for delivery for a period longer than thirty days from the date of the contract.

No contract shall be made for the sale of coal for delivery after the expiration date of this Act at a price below the minimum or above the maximum therefor established by the Commission and in effect at the time of making the contract.

The minimum prices established in accordance with the provisions of this section shall not apply to coal sold and shipped outside the domestic market. The domestic market shall include all points within the continental United States and Canada, and car-ferry shipments to the island of Cuba. Bunker coal delivered to steamships for consumption thereon shall be regarded as shipped within the domestic market. Maximum prices established in accordance with the provisions of this section shall not apply to coal sold and shipped outside the continental United States.

(f) All data, reports, and other information in the possession of any agency of the United States in relation to coal shall be available to the Commission and to the office of the consumers' counsel for the administration of this Act.

(g) The price provisions of this Act shall not be evaded or violated by or through the use of docks or other storage facilities or transportation facilities, or by or through the use of subsidiaries, affiliated sales or transportation companies or other intermediaries or instrumentalities, or by or through the absorption, directly or indirectly, c any transportation or incidental charge of whatsoever kind or character, or any part thereof. The Commission is hereby authorized, after investigation and hearing, and upon notice to the interested parties, to make and issue rules and regulations to make this subsection effective.

(h) The Commission shall, by order, prescribe due and reasonable maximum discounts or price allowances that may be made by code members to persons (whether or not code members), herein referred to as "distributors", who purchase coal for resale and resell it in not less than cargo or railroad carload lots; and shall require the maintenance and observance by such persons, in the resale of such coal, of the prices and marketing rules and regulations established under this section.

UNFAIR METHODS OF COMPETITION

(i) The following practices with respect to coal shall be unfair methods of competition and shall constitute violations of the code:

1. The consignment of unordered coal, or the forwarding of coal which has not actually been sold, consigned to the producer or his

t: *Provided, however*, That coal which has not actually been sold be forwarded, consigned to the producer or his agent at rail or k yards, tidewater ports, river ports, or lake ports, or docks nd such ports, when for application to any of the following es: Bunker coal, coal applicable against existing contracts, coal storage (other than in railroad cars) by the producer or his t in rail or track yards or on docks, wharves, or other yards for le by the producer or his agent.

The adjustment of claims with purchasers of coal in such ner as to grant secret allowances, secret rebates, or secret con-ons, or other price discrimination.

The prepayment of freight charges with intent to or having the t of granting a discriminatory credit allowance.

The granting in any form of adjustments, allowances, discounts, its, or refunds to purchasers or sellers of coal, for the purposes ith the effect of altering retroactively a price previously agreed n, in such manner as to create price discrimination.

The predating or postdating of any invoice or contract for the hase or sale of coal, except to conform to a bona-fide agreement he purchase or sale entered into on the predate.

The payment or allowance in any form or by any device of tes, refunds, credits, or unearned discounts, or the extension to ain purchasers of services or privileges not extended to all pur-ers under like terms and conditions, or under similar circum-ces.

The attempt to purchase business, or to obtain information con-ing a competitor's business by concession, gifts, or bribes.

The intentional misrepresentation of any analysis or of analyses, f sizes, or the intentional making, causing, or permitting to be e, or publishing, of any false, untrue, misleading, or deceptive ement by way of advertising, invoicing, or otherwise concerning size, quality, character, nature, preparation, or origin of any bought, sold, or consigned.

The unauthorized use, whether in written or oral form, of trade-ks, trade names, slogans, or advertising matter already adopted competitor, or any deceptive approximation thereof.

. Inducing or attempting to induce, by any means or device what-er, a breach of contract between a competitor and his customer ng the term of such contract.

. Splitting or dividing commissions, brokers' fees, or brokerage ounts, or otherwise in any manner directly or indirectly using erage commissions or jobbers' arrangements or sales agencies for ing discounts, allowances, or rebates, or prices other than those rmined under this Act, to any industrial consumer or to any ilers, or to others, whether of a like or different class.

. Selling to, or through, any broker, jobber, commission account, ales agency, which is in fact or in effect an agency or an instru-tality of a retailer or an industrial consumer or of an organiza-of retailers or industrial consumers, whereby they are [1] any of n secure either directly or indirectly a discount, dividend, allow-, or rebates, or a price other than that determined in the manner cribed by this Act.

. Employing any person or appointing any sales agent, at a pensation obviously disproportionate to the ordinary value of

[1] in original.

the service or services rendered, and whose employment or appointment is made with the primary intention and purpose of securing preferment with a purchaser or purchasers of coal.

It shall not be an unfair method of competition or a violation of the code or any requirement of this Act (1) to sell to or through any bona-fide and legitimate farmers' cooperative organization duly organized under the laws of any State, Territory, the District of Columbia, or the United States whether or not such organization grants rebates, discounts, patronage dividends, or other similar benefits to its members; (2) to sell through any intervening agency to any such cooperative organization; or (3) to pay or allow to any such cooperative organization or to any such intervening agency any discount, commission, rebate, or dividend ordinarily paid or allowed, or permitted by the code to be paid or allowed, to other purchasers for purchases in wholesale or middleman quantities.

(j) The Commission shall have jurisdiction to hear and determine written complaints made by any code member, district board, or member thereof, State or political subdivision of a State, or the consumers' counsel, which charge any violation of the code specified in part II of this section. It shall make and publish rules and regulations for the consideration and hearing of any such complaint, and all interested parties shall be required to conform thereto. The Commission shall make due effort toward adjustment of such complaints and shall endeavor to compose the differences of the parties, and shall make such order or orders in the premises, from time to time, as the facts and the circumstances warrant. Any such order shall be subject to review as are other orders of the Commission.

(k) In the investigation of any complaint or violation of the code, or of any rule or regulation the observance of which is required under the terms thereof, the Commission shall have power by order to require such reports from, and shall be given access to inspect the books and records of, code members to the extent deemed necessary for the purpose of determining the complaint. Any such order shall be subject to review as are other orders of the Commission.

(l) The provisions of this section shall not apply to coal consumed by the producer or to coal transported by the producer to himself for consumption by him.

SEC. 4–A. Whenever the Commission upon investigation instituted upon its own motion or upon petition of any code member, district board, State or political subdivision thereof, or the consumers' counsel, after hearing finds that transactions in coal in intrastate commerce by any person or in any locality cause any undue or unreasonable advantage, preference, or prejudice as between persons and localities in such commerce on the one hand and interstate commerce in coal on the other hand, or any undue, unreasonable, or unjust discrimination against interstate commerce in coal, or in any manner directly affect interstate commerce in coal, the Commission shall by order so declare and thereafter coal sold, delivered or offered for sale in such intrastate commerce shall be subject to the provisions of section 4.

Any producer believing that any commerce in coal is not subject to the provisions of section 4 or to the provisions of the first paragraph of this section may file with the Commission an application,

verified by oath or affirmation for exemption, setting forth the facts upon which such claim is based. The filing of such application in good faith shall exempt the applicant, beginning with the third day following the filing of the application, from any obligation, duty, or liability imposed by section 4 with respect to the commerce covered by the application until such time as the Commission shall act upon the application. If the Commission has reason to believe that such exemption during the period prior to action upon the application is likely to permit evasion of the Act with respect to commerce in coal properly subject to the provisions of section 4 or of the first paragraph of this section, it may suspend the exemption for a period not to exceed ten days. Within a reasonable time after the receipt of any application for exemption the Commission shall enter an order granting, or, after notice and opportunity for hearing, denying or otherwise disposing of such application. As a condition to the entry of and as a part of any order granting such application, the Commission may require the applicant to apply periodically for renewals of such order and to file such periodic reports as the Commission may find necessary or appropriate to enable it to determine whether the conditions supporting the exemption continue to exist. Any applicant aggrieved by an order denying or otherwise disposing of an application for exemption by the Commission may obtain a review of such order in the manner provided in subsection (b) of section 6.

ORGANIZATION OF THE CODE

SEC. 5 (a) Upon the appointment of the Commission it shall at once promulgate said code and assist in the organization of the district boards as provided for in section 4, and shall prepare and supply to all coal producers forms of acceptance for membership therein. Such forms of acceptances, when executed, shall be acknowledged before any official authorized to take acknowledgments.

(b) The membership of any such coal producer in such code and his right to an exemption from the taxes imposed by section 8 (b) of this Act, may be revoked by the Commission upon written complaint by any code member or district board, or any State or political subdivision of a State, or the consumers' counsel, after a hearing, with thirty days' written notice to the member, upon proof that such member has willfully violated any provision of the code or any regulation made thereunder; and in such a hearing any code member or district board, or any State or political subdivision of a State, or the consumers' counsel, or any consumer or employee, and the Commissioner of Internal Revenue, shall be entitled to present evidence and be heard: *Provided*, That the Commission, in its discretion, may in such case make an order directing the code member to cease and desist from violations of the code and regulations made thereunder and upon failure of the code member to comply with such order the Commission may apply to a circuit court of appeals to enforce such order in accordance with the provisions of subsection (c) of section 6 or may reopen the case upon ten days' notice to the code member affected and proceed in the hearing thereof as above provided.

The Commission shall keep a record of the evidence heard by it in any proceeding to cancel or revoke the membership of any code

member and its findings of fact, if supported by substantial evidence, shall be conclusive upon any proceeding to review the action and order of the Commission in any court of the United States.

In making an order revoking membership in the code as in this subsection provided, the Commission shall specifically find (1) the day or days on which the violations occurred; (2) the quantity of coal sold or otherwise disposed of in violation of the code or regulations thereunder; (3) the sales price at the mine or the market value at the mine if disposed of otherwise than by sale at the mine, or if sold otherwise than through an arms' length transaction, of the coal sold or otherwise disposed of by such code member in violation of the code or regulations thereunder; (4) the minimum price established by the Commission for such coal and in effect at the time of such sale or other disposal; (5) the amount of tax required to be paid by the code member as a condition to reinstatement to membership in the code as in subsection (c) hereof provided.

(c) Any producer whose membership in the code and whose right to an exemption from the tax imposed by section 3 (b) of this Act shall have been revoked and canceled may apply to the Commission and shall have the right to have his membership in the code restored upon payment by him to the United States of double the amount of the tax provided in section 3 (b) upon the sales price at the mine, or the market value at the mine if disposed of otherwise than by sale at the mine, or if sold otherwise than through an arms' length transaction, of the coal sold or disposed of by the code member in violation of the code or regulations thereunder (but in no case shall such sales price or market value be taken to be less than the minimum price established by the Commission for such coal and in effect at the time of such sale or other disposal), as found by the Commission under subsection (b) hereof. The Commission shall thereupon certify to the Commissioner of Internal Revenue and to the collector of internal revenue for the internal revenue collection district in which the producer resides the amount of the required payment as found under clause (5) of subsection (b), and upon payment of such amount to the Commissioner or the collector such officer shall notify the Commission thereof.

(d) Any code member who shall be injured in his business or property by any other code member by reason of the doing of any act which is forbidden or the failure to do any act which is required by this Act or by the code or any regulation made thereunder, may sue therefor in any court of competent jurisdiction where the defendant resides, or is found or has an agent or a place of business, without respect to the amount in controversy, and shall recover threefold damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

SEC. 6. (a) All rules, regulations, determinations, and promulgations of any district board shall be subject to review by the Commission upon appeal by any producer and upon just cause shown shall be amenable to the order of the Commission; and appeal to the Commission shall be a matter of right in all cases to every producer and to all parties in interest, including any State or any political subdivision thereof. In the event that a district board shall fail, for any reason, to take action authorized or required by this Act, then the

ommission may take such action in lieu of the district board. The ommission may also provide rules for the determination of contro- rsies arising under this Act by voluntary submission thereof to bitration, which determination shall be final and conclusive.

(b) Any person aggrieved by an order issued by the Commission a proceeding to which such person is a party may obtain a review such order in the Circuit Court of Appeals of the United States, thin any circuit wherein such person resides or has his principal ace of business, or in the United States Court of Appeals for the strict of Columbia, by filing in such court, within sixty days after e entry of such order, a written petition praying that the order the Commission be modified or set aside in whole or in part. A py of such petition shall be forthwith served upon any member the Commission and thereupon the Commission shall certify and in the court a transcript of the record upon which the order mplained of was entered. Upon the filing of such transcript such urt shall have exclusive jurisdiction to affirm, modify, and enforce set aside such order, in whole or in part. No objection to the der of the Commission shall be considered by the court unless such jection shall have been urged below. The finding of the Com- ssion as to the facts, if supported by substantial evidence, shall be nclusive. If either party shall apply to the court for leave to duce additional evidence, and shall show to the satisfaction of the urt that such additional evidence is material and that there were asonable grounds for failure to adduce such evidence in the hearing fore the Commission, the court may order such additional evi- nce to be taken before the Commission and to be adduced upon e hearing in such manner and upon such terms and conditions as the court may seem proper. The Commission may modify its dings as to the facts, by reason of the additional evidence so ken, and it shall file such modified or new findings, which, if sup- rted by substantial evidence, shall be conclusive, and its recom- ndation, if any, for the modification or setting aside of the original der. The judgment and decree of the court, affirming, modifying, d enforcing or setting aside, in whole or in part, any such order the Commission shall be final, subject to review by the Supreme urt of the United States upon certiorari or certification as pro- ded in sections 239 and 240 of the Judicial Code, as amended . S. C., title 28, secs. 346 and 347).

The commencement of proceedings under this subsection shall not, less specifically ordered by the court, operate as a stay of the mmission's order.

(c) If any code member fails or neglects to obey any order of e Commission while the same is in effect, the Commission in its cretion may apply to the Circuit Court of Appeals of the United tes within any circuit where such code member resides or carries business, for the enforcement of its order, and shall certify and with its application a transcript of the entire record in the pro- ding, including all the testimony taken and the report and order the Commission. Upon such filing of the application and tran- ipt the court shall cause notice thereof to be served upon such le member and thereupon shall have jurisdiction of the proceed- g and of the question determined therein, and shall have power to

make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission. The findings of the Commission as to facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper.

The Commission may modify its findings as to the facts or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which if supported by substantial evidence shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(d) The jurisdiction of the Circuit Court of Appeals of the United States or the United States Court of Appeals for the District of Columbia, as the case may be, to enforce, set aside, or modify orders of the Commission shall be exclusive.

SEC. 7. All provisions of law, including penalties and refunds, applicable in respect of the taxes imposed by Title IV of the Revenue Act of 1932, as amended, shall, insofar as applicable and not inconsistent with the provisions of this Act, be applicable with respect to taxes imposed under this Act.

SEC. 8. (a) The members of the Commission are authorized to administer oaths to witnesses appearing before the Commission and to authorize the taking of depositions in any proceedings; and, for the purpose of conducting its investigations, said Commission shall have full power to issue subpenas and subpenas duces tecum, which shall be as nearly as may be in the form of subpenas issued by district courts of the United States. In case of contumacy by or refusal to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. Upon the filing of the application for such aid with the clerk of the court the court shall, either in term time or vacation, forthwith enter an order of record, requiring such person to appear before such court at a time stated in the order not more than ten days from the entry of the order (unless for good cause shown such time is extended), and show cause why he should not be required to obey such subpena, and upon his failure to show cause it shall be the duty of the court to order such witness to appear before the said Commission and give such testimony or produce such evidence as may be lawfully required by

said Commission. The district court, either in term time or vacation, shall have full power to punish for contempt as in other cases of refusal to obey the process and order of such court. Witnesses summoned before the Commission or when depositions are taken upon order of the Commission, shall be paid the same fees and mileage as are paid witnesses in the courts of the United States, and officers taking such depositions shall be paid the same fees as are paid for like services in courts of the United States.

(b) No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other records and documents before the Commission, or in obedience to the subpena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

SEC. 9. (a) It is hereby declared to be the public policy of the United States that—

(1) Employees of producers of coal shall have the right to organize and to bargain collectively with respect to their hours of labor, wages, and working conditions through representatives of their own choosing, without restraint, coercion, or interference on the part of the producers.

(2) No producer shall interfere with, restrain, or coerce employees in the exercise of their said rights, nor discharge or discriminate against any employee for the exercise of such rights.

(3) No employee of any producer and no one seeking employment with him or it shall be required as a condition of employment to join any association of employees for collective bargaining in the management of which the producer has any share of direction or control.

(b) No coal (except coal with respect to which no bid is required by law prior to purchase thereof) shall be purchased by the United States, or by any department or agency thereof, produced at any mine where the producer failed at the time of the production of such coal to accord to his or its employees the rights set forth in subsection (a) of this section.

(c) On the complaint of any employee of a producer of coal, or other interested party, the Commission may hold a hearing to determine whether any producer supplying coal for the use of the United States or any agency thereof, is complying with the provisions of subsection (a) of this section. If the Commission shall find that such producer is not complying with such provisions, it shall certify its findings to the department or agency concerned. Such department or agency shall thereupon declare the contract for the supply of the coal of such producer to be canceled and terminated.

(d) Nothing contained in this Act or section shall be construed to repeal or modify the provisions of the Act of March 23, 1932 (ch.

7 Stat. 70), or of the Act of July 5, 1935 (ch. 372, 49 Stat. 449), wn as the National Labor Relations Act, or of any other Act of gress regarding labor relations or rights of employees to organize argain collectively, or of the Act of June 30, 1936 (ch. 881, 49 2036).

c. 10. (a) The Commission may require reports from producers may use such other sources of information available as it deems sable, and may require producers to maintain a uniform system ccounting of costs, wages, operations, sales, profits, losses, and other matters as may be required in the administration of this No information obtained from a producer disclosing costs of uction or sales realization shall be made public without the con- of the producer from whom the same shall have been obtained, pt where such disclosure is made in evidence in any hearing re the Commission or any court and except that such information be compiled in composite form in such manner as shall not be rious to the interests of any producer and, as so compiled, may ublished by the Commission.

) Any officer or employee of the Commission or of any district d who shall, in violation of the provisions of subsection (a), e public any information obtained by the Commission or the ict board, without its authority, unless directed by a court, shall eemed guilty of a misdemeanor, and, upon conviction thereof, l be punished by a fine not exceeding $500, or by imprisonment exceeding six months, or by both fine and imprisonment, in the etion of the court.

) If any producer required by this Act or the code or regulation e thereunder to file a report shall fail to do so within the time l for filing the same, and such failure shall continue for fifteen after notice of such default, the producer shall forfeit to the ed States the sum of $50 for each and every day of the continuance uch failure, which forfeiture shall be payable into the Treasury he United States, and shall be recoverable in a civil suit in the e of the United States, brought in the district where the producer his principal office or in any district in which he shall do business. hall be the duty of the various district attorneys, under the direc- of the Attorney General of the United States, to prosecute for recovery of forefeiture.

c. 11. State laws regulating the mining of coal not inconsistent with are not affected by this Act.

c. 12. Any combination between producers creating a marketing ncy for the disposal of competitive coals in interstate commerce n intrastate commerce directly affecting interstate commerce in at prices to be determined by such agency, or by the agreement he producers operating through such agency, shall, after promul- on of the code provided for in section 4, be unlawful as a restraint nterstate trade and commerce within the provisions of the Act Congress of July 2, 1890, known as the Sherman Act, and Acts ndatory and supplemental thereto, unless such producers have pted the code provided for in section 4 and shall comply with its isions.

ubject to the approval of the Commission, a marketing agency as to its members, or such marketing agencies may, as between

and among themselves, provide for the cooperative marketing of their coal, at prices not below the effective minimum prices nor above the effective maximum prices prescribed in accordance with section 4: *Provided*, That no such approval shall be granted by the Commission unless it shall find that the agreement under which such agency or agencies propose to function (1) will not unreasonably restrict the supply of coal in interstate commerce, (2) will not prevent the public from receiving coal at fair and reasonable prices, (3) will not operate against the public interest, and (4) that each such agency and its members have agreed to observe the effective marketing regulations and minimum and maximum prices from time to time established by the Commission and otherwise to conduct the business and operations of the agency in conformity with reasonable regulations for the protection of the public interest, to be prescribed by the Commission.

The Commission may, by order, upon complaint of any code member, district board, or member thereof, any State or political subdivision thereof, the consumers' counsel or any other interested person, or on its own motion, suspend or revoke its prior approval of any such marketing agency agreement upon finding that the regulations and orders of the Commission or the requirements of this section have been violated. Unless and until the approval of the Commission is suspended or revoked, neither the agreement creating such marketing agency nor any agreement between such agencies, which has been approved by the Commission, nor any act done in pursuance thereof, by such agency or agencies, or the members thereof, and not in violation of the terms of the Commission's approval, shall be construed to be within the prohibitions of the antitrust laws of the United States.

SEC. 13. If any provision of this Act or the code provided herein, or any section, subsection, paragraph, or proviso, or the application thereof to any person or circumstances, is held invalid, the remainder of this Act or code, and the application thereof to other persons or circumstances, shall not be affected thereby; and if either or any of the provisions of this Act or code relating to prices or unfair methods of competition shall be found to be invalid, they shall be held separable from other provisions not in themselves found to be invalid.

OTHER DUTIES OF THE COMMISSION

SEC. 14. (a) The Commission shall study and investigate the matter of increasing the uses of coal and the problems of its importation and exportation; and shall further investigate—

(1) The economic operations of mines with the view to the conservation of the national coal resources.

(2) The safe operation of mines for the purpose of minimizing working hazards, and for such purpose shall be authorized to utilize the services of the Bureau of Mines.

(3) The problem of marketing to lower distributing costs for the benefit of consumers.

(4) The Commission shall, as soon as reasonably possible after its appointment, investigate the necessity for the control of production of coal and methods of such control, including allotment of

output to districts and producers within such districts and shall hold hearings thereon.

(b) The Commission shall annually report the results of its investigations under this section, together with its recommendations, to the Secretary of the Interior for transmission by him to Congress.

SEC. 15. Upon substantial complaint that coal prices are excessive, and oppressive of consumers, or that any district board, or producers' marketing agency, is operating against the public interest, or in violation of this Act, the Commission may hear such complaint, and its findings shall be made public; and the Commission shall make proper orders within the purview of this Act so as to correct such abuses. The Commission may institute proceedings under this section, and complaints may be made by any State or political subdivision of a State or by the consumers' counsel.

SEC. 16. To safeguard the interests of those concerned in the mining, transportation, selling, and consumption of coal, the Commission or the office of consumers' counsel is hereby vested with authority to make complaint to the Interstate Commerce Commission with respect to rates, charges, tariffs, and practices relating to the transportation of coal, and to prosecute the same. Before proceeding to hear and dispose of any complaint filed by another than the Commission, involving the transportation of coal, the Interstate Commerce Commission shall cause the Commission and the office of consumers' counsel to be notified of the proceeding and, upon application to the Interstate Commerce Commission, shall permit the Commission and consumers' counsel to appear and be heard. The Interstate Commerce Commission is authorized to avail itself of the cooperation, services, records, and facilities of the Commission.

SEC. 17. As used in this Act—

(a) The term "coal" means bituminous coal.

(b) The term "bituminous coal" includes all bituminous, semibituminous, and subbituminous coal and shall exclude lignite, which is defined as a lignitic coal having calorific value in British thermal units of less than seven thousand six hundred per pound and having a natural moisture content in place in the mine of 30 per centum or more.

(c) The term "producer" includes all individuals, firms, associations, corporations, trustees, and receivers engaged in the business of mining coal.

(d) The term "interstate commerce" means commerce among the several States and Territories, with foreign nations, and with the District of Columbia.

(e) The term "United States" when used in a geographical sense includes only the States, the Territories of Alaska and Hawaii, and the District of Columbia.

SEC. 18. Section 3 of this Act shall become effective on the first day of the second calendar month after the enactment of this Act, unless the Commission shall not at that time have promulgated the code and forms of acceptance for membership therein, in which event section 3 of this Act shall become effective from and after the date when the Commission shall have promulgated the code and such forms of acceptances, which date shall be promulgated by Executive order of the President of the United States. All other sections,

except section 20 (a), of this Act shall become effective on the day of the approval of this Act.

SEC. 19. This Act shall cease to be in effect (except as provided in section 13 of the Revised Statutes) and any agencies and offices established thereunder shall cease to exist on and after four years from the date of the approval of this Act.

SEC. 20. (a) The Bituminous Coal Conservation Act of 1935 is hereby repealed, but such repeal shall not be effective until the consumers' counsel and a majority of the members of the Commission have been appointed.

(b) There is hereby authorized to be appropriated from time to time such sums as may be necessary for the administration of this Act. All sums heretofore or hereafter appropriated or made available to the National Bituminous Coal Commission and to the consumers' counsel of the National Bituminous Coal Commission established under the Bituminous Coal Conservation Act of 1935 are hereby transferred and made available for the uses and during the periods for which appropriated, in the administration of this Act by the National Bituminous Coal Commission and the office of the consumers' counsel herein created.

(c) The records, property, and equipment of the National Bituminous Coal Commission and the consumers' counsel, respectively, established under the Bituminous Coal Conservation Act of 1935 are hereby transferred to the Commission and the consumers' counsel, respectively, established under this Act.

SEC. 21. This Act may be cited as the Bituminous Coal Act of 1937.

ANNEX TO ACT—SCHEDULE OF DISTRICTS

EASTERN PENNSYLVANIA

District 1. The following counties in Pennsylvania: Bedford, Blair, Bradford, Cambria, Cameron, Centre, Clarion, Clearfield, Clinton, Elk, Forest, Fulton, Huntingdon, Jefferson, Lycoming, McKean, Mifflin, Potter, Somerset, Tioga.

Armstrong County, including mines served by the P. & S. R. R. on the west bank of the Allegheny River, and north of the Conemaugh division of the Pennsylvania Railroad.

Fayette County, all mines on and east of the line of Indian Creek Valley branch of the Baltimore and Ohio Railroad.

Indiana County, north of but excluding the Saltsburg branch of the Pennsylvania Railroad between Edri and Blairsville, both exclusive.

Westmoreland County, including all mines served by the Pennsylvania Railroad, Torrance, and east.

All coal-producing counties in the State of Maryland.

The following counties in West Virginia: Grant, Mineral, and Tucker.

WESTERN PENNSYLVANIA

District 2. The following counties in Pennsylvania: Allegheny, Beaver, Butler, Greene, Lawrence, Mercer, Venango, Washington.

Armstrong County, west of the Allegheny River and exclusive of mines served by the P. & S. R. R.

Indiana County, including all mines served on the Saltsburg branch of the Pennsylvania Railroad north of Conemaugh River.

Fayette County, except all mines on and east of the line of Indian Creek Valley branch of the Baltimore and Ohio Railroad.

Westmoreland County, including all mines except those served by the Pennsylvania Railroad from Torrance, east.

NORTHERN WEST VIRGINIA

District 3. The following counties in West Virginia: Barbour, Braxton, Calhoun, Doddridge, Gilmer, Harrison, Jackson, Lewis, Marion, Monongalia, Pleasants, Preston, Randolph, Ritchie, Roane, Taylor, Tyler, Upshur, Webster, Wetzel, Wirt, Wood.

That part of Nicholas County including mines served by the Baltimore and Ohio Railroad and north.

OHIO

District 4. All coal-producing counties in Ohio.

MICHIGAN

District 5. All coal-producing counties in Michigan.

PANHANDLE

District 6. The following counties in West Virginia: Brooke, Hancock, Marshall, and Ohio.

SOUTHERN NUMBERED 1

District 7. The following counties in West Virginia: Greenbrier, Mercer, Monroe, Pocahontas, Summers.

Fayette County, east of Gauley River and including the Gauley River branch of the Chesapeake and Ohio Railroad and mines served by the Virginian Railway.

McDowell County, that portion served by the Dry Fork branch of the Norfolk and Western Railroad and east thereof.

Raleigh County, excluding all mines on the Coal River branch of the Chesapeake and Ohio Railroad.

Wyoming County, that portion served by the Gilbert branch of the Virginian Railway lying east of the mouth of Skin Fork of Guyandot River and that portion served by the main line and the Glen Rogers branch of the Virginian Railway.

The following counties in Virginia: Montgomery, Pulaski, Wythe, Giles, Craig.

Tazewell County, that portion served by the Dry Fork branch to Cedar Bluff and from Bluestone Junction to Boissevain branch of the Norfolk and Western Railroad and Richlands-Jewell Ridge branch of the Norfolk and Western Railroad.

Buchanan County, that portion served by the Richlands-Jewell Ridge branch of the Norfolk and Western Railroad and that portion of said county on the headwaters of Dismal Creek, east of Lynn Camp Creek (a tributary of Dismal Creek).

SOUTHERN NUMBERED 2

District 8. The following counties in West Virginia: Boone, Clay, Kanawha, Lincoln, Logan, Mason, Mingo, Putnam, Wayne, Cabell.

Fayette County, west of, but not including mines of the Gauley River branch of the Chesapeake and Ohio Railroad.

McDowell County, that portion not served by and lying west of the Dry Fork branch of the Norfolk and Western Railroad.

Raleigh County, all mines on the Coal River branch of the Chesapeake and Ohio Railroad and north thereof.

Nicholas County, that part south of and not served by the Baltimore and Ohio Railroad.

Wyoming County, that portion served by Gilbert branch of the Virginian Railway lying west of the mouth of Skin Fork of Guyandot River.

The following counties in Virginia: Dickinson, Lee, Russell, Scott, Wise.

All of Buchanan County, except that portion on the headwaters of Dismal Creek, east of Lynn Camp Creek (tributary of Dismal Creek) and that portion served by the Richlands-Jewell Ridge branch of the Norfolk and Western Railroad.

Tazewell County, except portions served by the Dry Fork branch of Norfolk and Western Railroad and branch from Bluestone Junction to Boissevain of Norfolk and Western Railroad and Richlands-Jewell Ridge branch of the Norfolk and Western Railroad.

The following counties in Kentucky: Bell, Boyd, Breathitt, Carter, Clay, Elliott, Floyd, Greenup, Harlan, Jackson, Johnson, Knott, Knox, Laurel, Lawrence, Lee, Leslie, Letcher, McCreary, Magoffin, Martin, Morgan, Owsley, Perry, Pike, Rockcastle, Wayne, Whitley.

The following counties in Tennessee: Anderson, Campbell, Claiborne, Cumberland, Fentress, Morgan, Overton, Roane, Scott.

The following counties in North Carolina: Lee, Chatham, Moore.

WEST KENTUCKY

District 9. The following counties in Kentucky: Butler, Christian, Crittenden, Daviess, Hancock, Henderson, Hopkins, Logan, McLean, Muhlenberg, Ohio, Simpson, Todd, Union, Warren, Webster.

ILLINOIS

District 10. All coal-producing counties in Illinois.

INDIANA

District 11. All coal-producing counties in Indiana.

IOWA

District 12. All coal-producing counties in Iowa.

SOUTHEASTERN

District 13. All coal-producing counties in Alabama.

The following counties in Georgia: Dade, Walker.

The following counties in Tennessee: Marion, Grundy, Hamilton, Bledsoe, Sequatchie, White, Van Buren, Warren, McMinn, Rhea.

ARKANSAS-OKLAHOMA

District 14. The following counties in Arkansas: All counties in the State.

The following counties in Oklahoma: Haskell, Le Flore, Sequoyah.

SOUTHWESTERN

District 15. All coal-producing counties in Kansas. All coal-producing counties in Texas. All coal-producing counties in Missouri.

The following counties in Oklahoma: Coal, Craig, Latimer, Muskogee, Okmulgee, Pittsburg, Rogers, Tulsa, Wagoner.

NORTHERN COLORADO

District 16. The following counties in Colorado: Adams, Arapahoe, Boulder, Douglas, Elbert, El Paso, Jackson, Jefferson, Larimer, Weld.

SOUTHERN COLORADO

District 17. The following counties in Colorado: All counties not included in northern Colorado district.

The following counties in New Mexico: All coal-producing counties in the State of New Mexico, except those included in the New Mexico district.

NEW MEXICO

District 18. The following counties in New Mexico: Grant, Lincoln, McKinley, Rio Arriba, Sandoval, San Juan, San Miguel, Santa Fe, Socorro.

The following counties in Arizona: Pinal, Navajo, Graham, Apache, Coconino.

All coal-producing counties in California.

WYOMING

District 19. All coal-producing counties in Wyoming.

The following counties in Idaho: Fremont, Jefferson, Madison, Teton, Bonneville, Bingham, Bannock, Power, Caribou, Oneida, Franklin, Bear Lake.

UTAH

District 20. All coal-producing counties in Utah.

NORTH DAKOTA-SOUTH DAKOTA

District 21. All coal-producing counties in North Dakota. All coal-producing counties in South Dakota.

MONTANA

District 22. All coal-producing counties in Montana.

WASHINGTON

District 23. All coal-producing counties in Washington. All coal-producing counties in Oregon.

The Territory of Alaska.

Approved, April 26, 1937.

UPREME COURT OF THE UNITED STATES.

No. 804.—October Term, 1939.

he Sunshine Anthracite Coal Company, Appellant, *vs.* mer M. Adkins, as Collector of Internal Revenue for the District of Arkansas.	Appeal from the District Court of the United States for the Eastern District of Arkansas.

[May 20, 1940.]

Mr. Justice Douglas delivered the opinion of the Court.

The labor provisions of the Bituminous Coal Conservation Act of 35 (49 Stat. 991) were held unconstitutional by this Court in *rter v. Carter Coal Co.*, 298 U. S. 238. The Bituminous Coal Act 1937 (50 Stat. 72) was thereupon enacted. It eliminated those ovisions of the earlier Act and made other substantive and structural changes.[1] The basic problem here involved is the constitunality of the 1937 Act.

That Act provides for the regulation of the sale and distribution bituminous coal by the National Bituminous Coal Commission[2] th the cooperation of the bituminous coal industry. Its aim is e stabilization of the industry primarily through price-fixing and e elimination of unfair competition. It is provided in § 4 that e coal producers, accepting membership, shall be organized under e Bituminous Coal Code. Some twenty district boards of code embers are provided for, which are to operate as an aid to the ommission but subject to its pervasive surveillance and authority. he statute specifies in detail the methods of their organization and eration, the scope of their functions, and the jurisdiction of the ommission over them. The Commission is empowered to fix mini-

[1] H. Report No. 294, 75th Cong., 1st Sess., pp. 2-3.

[2] Though we refer throughout to the Commission, it should be noted that its nctions have been administered since July 1, 1939, by the Bituminous Coal ivision of the Department of the Interior. Reorganization Plan No. II, (a) and (b), submitted by the President to the Congress May 9, 1939. Pub. s. No. 20, 76th Cong., 1st Sess., c. 193, approved June 7, 1939.

um prices for code members in accordance with stated standards. nder § 4, II(a) each board shall "on its own motion or when di-ected by the Commission" propose minimum prices pursuant to rescribed statutory standards. These may be approved, disap-roved, or modified by the Commission as the basis for the coor-ination of minimum prices. Somewhat comparable machinery provided for such coordination of minimum prices "in ommon consuming market areas upon a fair competitive basis", 4, II(b), and for establishment of rules and regulations incidental the sale and distribution of coal by code members. § 4, II(a). he Commission is also given power by § 4, II(c) to establish maxi-um prices for code members pursuant to standards prescribed erein. The sale, delivery, or offer for sale of coal below the mini-um or above the maximum prices established by the Commission made a violation of the code. § 4, II(e). So are numerous prac-ices, specified in § 4, II(i) as unfair methods of competition. And ontracts for the sale of coal at prices below the prescribed minimum r above the maximum are invalid and unenforceable. § 4, II(e). he Commission may, after hearing, revoke the code membership f any coal producer for willful violation of the code or of any egulation made thereunder. § 5(b).

Sec. 3(a) imposes an excise tax of 1 cent per ton of two thousand ounds upon the sale or other disposition by the producer of bitu-inous coal produced in the United States.[3] Sec. 3(b) imposes an dditional 19½% tax (based on sale price or in certain cases on air market value) on sales of bituminous coal by producers "which ould be subject to the application of the conditions and provisions f the code provided for in section 4, or of the provisions of section -A".[4] Producers who are members of the code are exempt from hat tax. As we shall see, the interpretation of § 3(b) is a subject f controversy. But if, as the government contends, the 19½%

[3] These provisions are now found in § 3520 of the Internal Revenue Code. 53 Stat. 450). The 1¢ tax was apparently designed to cover the adminis-rative costs of the Act. See H. Report No. 294, *supra* note 1, pp. 2-3, recom-ending a ½% tax which in conference was changed to 1¢ per ton. H. Report o. 578, 75th Cong., 1st Sess., p. 5.

[4] Sec. 4, as we have seen, governs the constitution and operation of the code. ec. 4-A provides, *inter alia*, that the Commission shall subject coal in intra-ate commerce to the provisions of § 4 if it finds after hearing that transac-ons in that coal "cause any undue or unreasonable advantage, preference, or ejudice as between persons and localities in such commerce on the one hand d interstate coal on the other hand, or any undue, unreasonable, or unjust crimination against interstate commerce in coal, or in any manner directly fect interstate commerce in coal."

tax is applicable to sales by non-members, there are strong inducements for joining the code.

Machinery is provided in § 4-A for obtaining exemptions. A producer who believes that any commerce in coal is not, or may not be made, subject to the provisions of § 4 may file an application for exemption with the Commission. Subject to qualifications not material here, the filing of such application "in good faith" exempts the applicant from any "obligation, duty or liability" imposed by § 4 pending action by the Commission on the application. The Commission shall grant the application or, after notice and opportunity for hearing, shall deny or otherwise dispose of it. An applicant aggrieved by such denial or other disposition may obtain a review of the order in the Court of Appeals for the District of Columbia or in the Court of Appeals in the circuit where he resides or has his principal place of business. § 6(b). The findings of the Commission as to the facts, if supported by substantial evidence, are conclusive.

Appellant is lessee of coal lands in Arkansas and is engaged in the business of mining and shipping coal. It has not subscribed to or accepted the provisions of the Bituminous Coal Code provided for in § 4 of the Act. In August 1937 it filed an application for exemption on the grounds that its coal was not bituminous coal as defined in § 17(b) of the Act.[5] The Commission held a public hearing on that application in October 1937.[6] Appellant appeared, introduced evidence, and was heard on oral argument before the Commission.[7] In August 1938 the Commission handed down an opinion with findings of fact and conclusions of law and entered an order denying appellant's application for exemption on the grounds that its coal was bituminous within the meaning of § 17(b). Appellant obtained

[5] Sec. 17(b) provides: "The term 'bituminous coal' includes all bituminous, semibituminous, and subbituminous coal and shall exclude lignite, which is defined as a lignitic coal having calorific value in British thermal units of less than seven thousand six hundred per pound and having a natural moisture content in place in the mine of 30 per centum or more."

[6] This hearing was not restricted to appellant's application. Other producers in the same field intervened.

[7] The liberal notice and opportunity to be heard afforded appellant are illustrated by the following: In January 1938 the report of the examiner was served on appellant. In May 1938 a proposed report of the Commission was issued giving appellant 30 days to file exceptions and briefs and in that event to apply for oral argument. Appellant filed exceptions and asked for oral argument. Notice of oral argument was issued and oral argument was had. Thereafter the Commission issued its order denying the application.

a review of this order in the Circuit Court of Appeals. That court held that the Commission had jurisdiction to determine the status of coal claimed to be exempt and that the Commission's decision was based on substantial evidence. It accordingly affirmed the order. *Sunshine Anthracite Coal Co.* v. *National Bituminous Coal Commission*, 105 F. (2d) 559. We denied certiorari. 308 U. S. 604.

In May 1938, while the above proceeding was pending before the Commission, appellee demanded that appellant pay the taxes, penalties and interest accruing under § 3 (b) of the Act for the period ending February 1938, and filed a notice of tax liens against appellant's property. Thereupon appellant filed its complaint in this suit to enjoin the collection of the tax. A three-judge court was convened, which issued a temporary injunction. Apparently no further action was taken in this case until after the decision of the Circuit Court of Appeals in *Sunshine Anthracite Coal Co.* v. *National Bituminous Coal Commission*, *supra*, when appellee filed a supplemental answer stating that the decision in that case was *res judicata* as to the status of appellant's coal under the Act and that the district court had no jurisdiction over that subject matter. The court below denied appellant's motion to strike that portion of the answer. 31 F. Supp. 125. The case was tried. The court held the Act to be constitutional and dismissed the bill on the merits.[8] The case is here on appeal (50 Stat. 752; 28 U. S. C. A. § 380 (a)).

I. Appellant argues that it is not subject to the 19½% tax imposed by § 3 (b) because that section does not apply to producers who are not members of the code. Its argument rests on the construction of § 3 (b) and § 4. As we have seen, the former places the 19½% tax on the sale or other disposition of coal "which would be subject to the application of the conditions and provisions of the code provided for in section 4, or of the provisions of section 4-A." Sec. 4 provides that the "provisions of such code shall apply only to such code members." Appellant therefore contends that the tax is not applicable to its coal, since the coal produced by a non-code producer such as appellant is not subject to the provisions of the code.

[8] It granted, however, a permanent injunction against collection of taxes prior to December 4, 1939 the date on which this Court denied a petition for rehearing on the petition for certiorari. 308 U. S. 638. Appellee has not appealed from that part of the decree. The Court also granted a stay with respect to collection of taxes accruing after December 4, 1939, pending final disposition of this appeal.

But if the 19½% tax is not applicable to non-code members, it is not applicable to anyone since § 3(b) exempts code members from that tax. That construction would read the 19½% tax out of the Act. The essential sanction of the Act would then disappear and its effectiveness would be seriously impaired. That alternative will not be taken where a construction is possible which will preserve the vitality of the Act and the utility of the language in question. See *Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.*, 305 U. S. 315, 333 and cases cited. Only a highly strained construction of § 3(b) would lead to the conclusion that non-code members are exempt from the 19½% tax. It seems that Congress made a deliberate choice of words when it said that the tax applied to the sale or other disposition of coal which "would be" subject to § 4 and § 4-A. Sec. 4 is made expressly applicable "only to matters and transactions in or directly affecting interstate commerce in bituminous coal." Hence it seems plain that the tax was intended to apply only to those *sales* by non-code members which "would be" subject to *regulation* under § 4. Appellant's coal plainly falls in that class since practically its entire output is sold to purchasers outside the state of Arkansas. To sustain appellant's position we would not only have to substitute "is" for "would be"; we would have to override the express Congressional plan to make the 19½% tax "in aid of the regulation of interstate commerce" in bituminous coal.[9] That would be not only to rewrite § 3(b) but to remake the whole statutory scheme. Obviously such a task is not for the courts.

II. Appellant challenges the constitutionality of the Act on the grounds that the 19½% tax is not a tax but a penalty, that Congress lacks the power to fix minimum prices for bituminous coal sold in interstate commerce, that there has been an invalid delegation of legislative and judicial power, and that the division of bituminous coal into code and non-code classes is improper.

Clearly this tax is not designed merely for revenue purposes. In purpose and effect it is primarily a sanction to enforce the regulatory provisions of the Act. But that does not mean that the statute is invalid and the tax unenforceable. Congress may impose penal-

[9] H. Report, No. 294, *supra* note 1, states concerning this tax (p. 4): "Under subsection (b) a tax of 19½ percent is applied to coal which would be subject to the provisions in section 4 or the provisions of section 4A. Producers who are code members are exempt from this tax. This tax is intended to be in aid of the regulation of interstate commerce in coal provided for in sections 4 and 4A."

ties in aid of the exercise of any of its enumerated powers. The power of taxation, granted to Congress by the Constitution, may be utilized as a sanction for the exercise of another power which is granted it. *Head Money Cases*, 112 U. S. 580, 596. And see *Sonzinsky* v. *United States*, 300 U. S. 506. It is so utilized here.

The regulatory provisions are clearly within the power of Congress under the commerce clause of the Constitution. These provisions are applicable only to sales or transactions in, or directly or intimately affecting, interstate commerce. The fixing of prices, the proscription of unfair trade practices, the establishment of marketing rules respecting such sales of bituminous coal constitute regulations within the competence of Congress under the commerce clause. As stated by Mr. Justice Cardozo in his dissent in *Carter* v. *Carter Coal Co.*, *supra*, p. 326, "To regulate the price for such transactions is to regulate commerce itself, and not alone its antecedent conditions or its ultimate consequences." See *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420. What is true of prices is true of the attachment of other conditions to the flow of a commodity in interstate channels. *Mulford* v. *Smith*, 307 U. S. 38 and cases cited. Since this power when it exists is complete in itself, *Gibbons* v. *Ogden*, 9 Wheat. 1, 196, there can be no question but that the provisions of this Act are an exertion of the paramount federal power over interstate commerce. See *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533.

Nor does the Act violate the Fifth Amendment. Price control is one of the means available to the states (*Nebbia* v. *New York*, 291 U. S. 502) and to the Congress (*United States* v. *Rock Royal Co-operative, Inc.*, *supra*) in their respective domains (*Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511) for the protection and promotion of the welfare of the economy. But appellant claims that this Act is not an appropriate exercise of the Congressional power. It urges that the nature and use of bituminous coal in nowise endanger the health and morals of the populace; that no question of conservation is involved; that the ills of the industry are attributable to overproduction; that the increase of prices will cause a further loss of markets and add to the afflictions which beset the industry; and that the consuming public will be deprived of the wholesome restriction of the anti-trust laws. Those matters, however, relate to questions of policy, to the wisdom of the legislation, and to the ap-

propriateness of the remedy chosen—matters which are not our concern. If we endeavored to appraise them we would be trespassing on the legislative domain. And if we undertook to narrow the scope of federal intervention in this field, as suggested by appellant, we would be blind to at least thirty years of history. For a generation there have been various manifestations of incessant demand for federal intervention in the coal industry.[10] The investigations preceding the 1935 and 1937 Acts are replete with an exposition of the conditions which have beset that industry.[11] Official[12] and private[13] records give eloquent testimony to the statement of Mr. Justice Cardozo in the *Carter* case (p. 330) that free competition had been "degraded into anarchy" in the bituminous coal industry. Overproduction and savage, competitive warfare wasted the industry. Labor and capital alike were the victims. Financial distress among operators and acute poverty among miners prevailed even during periods of general prosperity. This history of the bituminous coal industry is written in blood as well as in ink.

It was the judgment of Congress that price-fixing and the elimination of unfair competitive practices were appropriate methods for prevention of the financial ruin, low wages, poor working conditions, strikes, and disruption of the channels of trade which followed in the wake of the demoralized price structures in this industry. If the strategic character of this industry in our economy and the chaotic conditions which have prevailed in it do not justify legislation, it is difficult to imagine what would. To invalidate this Act we would have to deny the existence of power on the part of Congress under the commerce clause to deal directly and specifically with those forces which in its judgment should not be permitted to dislocate an important segment of our economy and to disrupt and burden interstate channels of trade. That step could

[10] National Resources Committee, Energy Resources and National Policy (1939) pp. 41-123, 338-346, 405-423.

[11] Hearings on H. R. 8479, 74th Cong., 1st Sess.

[12] National Resources Committee, Energy Resources and National Policy, *supra* note 10; H. Rep. No. 1800, 74th Cong., 1st Sess., covering the 1935 Act; S. Rep. No. 252, H. Rep. No. 294, 75th Cong., 1st Sess., covering the 1937 Act; Appalachian Coals, Inc. v. United States, 288 U. S. 344; Third Annual Report Under the Bituminous Coal Act of 1937 (1940) pp. 4-5.

[13] Hamilton & Wright, The Case of Bituminous Coal (1926); Report of the Fifteenth Annual Meeting of the National Coal Assoc., Oct. 1934, pp. 9-11, 96-97.

not be taken without plain disregard of the Constitution. There are limits on the powers of the states to act as respects these interstate industries. *Baldwin* v. *G. A. F. Seelig, Inc., supra.* If the industry acting on its own had endeavored to stabilize the markets through price-fixing agreements, it would have run afoul of the Sherman Act. *United States* v. *Socony-Vacuum Oil Co., Inc.*, 309 U. S. —. But that does not mean that there is a no man's land between the state and federal domains. Certainly what Congress has forbidden by the Sherman Act it can modify. It may do so, by placing the machinery of price-fixing in the hands of public agencies. It may single out for separate treatment, as it has done on various occasions,[14] a particular industry and thereby remove the penalties of the Sherman Act as respects it. Congress under the commerce clause is not impotent to deal with what it may consider to be dire consequences of laissez-faire. It is not powerless to take steps in mitigation of what in its judgment are abuses of cut-throat competition. And it is not limited in its choice between unrestrained self-regulation on the one hand and rigid prohibitions on the other. The commerce clause empowers it to undertake stabilization of an interstate industry through a process of price-fixing which safeguards the public interest by placing price control in the hands of its administrative representative. *United States* v. *Rock Royal Co-operative, Inc., supra.* That was the choice which Congress made here. There is nothing in the *Carter* case which stands in the way. The majority of the Court in that case did not pass on the price-fixing features of the earlier Act. The Chief Justice and Mr. Justice Cardozo in separate minority opinions expressed the view that the price-fixing features of the earlier Act were constitutional. We rest on their conclusions for sustaining the present Act.

Nor does the Act contain an invalid delegation of legislative power. Under § 4, II (c) the Commission may fix maximum prices when in the public interest it deems it necessary in order to protect the consumer against unreasonably high prices. These maximum prices must be fixed at a uniform increase above minimum prices so that in the aggregate they will yield a reasonable return above the weighted average total cost of the district. And no maximum price shall be established for any mine which will not yield a fair return on the fair value of the property. The minimum prices to

[14] See United States v. Socony-Vacuum Oil Co., Inc., *supra*, p. —.

be fixed must conform to the following standards: the weighted average cost for each minimum price area must be computed, the elements of cost being defined; a classification of the various sizes and grades of coal shall be made which reflects as nearly as possible the relative market value of the various kinds, qualities, and sizes of coal, which is just and equitable as between producers within the district and which has due regard to the interests of the consuming public; and coordinated minimum prices shall be established for such coal (a) which reflect as nearly as possible the relative market values at points of delivery taking into account specifically enumerated factors, (b) which preserve as nearly as may be existing fair competitive opportunities, (c) which are just and equitable as between the districts, and (d) which, consistently with the process of coordination, yield a return to each area approximating its weighted average cost per ton."

The problem of fixing reasonable prices for bituminous coal cannot be differentiated legally from the task of fixing rates under the Interstate Commerce Act (41 Stat. 484, 49 U. S. C. A. § 15) and the Packers and Stockyards Act (42 Stat. 166, 7 U. S. C. A. § 211). The latter provide the standard of "just and reasonable" to guide the administrative body in the rate-making process. The validity of that standard (*Tagg Bros. & Moorhead* v. *United States, supra*), the appropriateness of the criterion of the "public interest" in various contexts (*New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 24; *United States* v. *Chemical Foundation, Inc.*, 272 U. S. 1; *Avent* v. *United States*, 266 U. S. 127), the legality of the standard of "unreasonable obstruction" to navigation (*Union Bridge Co.* v. *United States*, 204 U. S. 364) all make it clear that there is a valid delegation of authority in this case. The standards which Congress has provided here far exceed in specificity others which have been sustained. Certainly in the hands of experts the criteria which Congress has supplied are wholly adequate for carrying out the general policy and purpose of the Act. To require more would be to insist on a degree of exactitude which not only lacks legal necessity but which does not comport with the requirements of the administrative process. Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility. *Currin* v. *Wallace*, 306 U. S. 1, 15 and cases cited. But the effectiveness of both the

legislative and administrative processes would become endangered if Congress were under the constitutional compulsion of filling in the details beyond the liberal prescription here. Then the burdens of minutiae would be apt to clog the administration of the law and deprive the agency of that flexibility and dispatch which are its salient virtues. For these reasons we hold that the standards with which Congress has supplied the Commission are plainly valid. *United States* v. *Rock Royal Co-operative, Inc., supra.*

Nor has Congress delegated its legislative authority to the industry. The members of the code function subordinately to the Commission. It, not the code authorities, determines the prices. And it has authority and surveillance over the activities of these authorities. Since law-making is not entrusted to the industry, this statutory scheme is unquestionably valid. *Currin* v. *Wallace, supra,* and cases cited.

But appellant maintains that the delegation of authority to the Commission to determine what coal is subject to the Act is unlawful because of uncertainty in the statutory definition of bituminous coal. Sec. 17 (b) defines the term "bituminous coal" as follows:

"The term 'bituminous coal' includes all bituminous, semibituminous, and subbituminous coal and shall exclude lignite, which is defined as a lignitic coal having calorific value in British thermal units of less than seven thousand six hundred per pound and having a natural moisture content in place in the mine of 30 per centum or more."

As in the case of the term "interurban" electric railway in the Railway Labor Act (*Shields* v. *Utah Idaho Central Railroad Co.*, 305 U. S. 177) we think the definition of bituminous coal is wholly adequate as a standard for administrative action. The fact that it is not a chemist's or an engineer's definition is not fatal. The definition is not devoid of meaning. We are unable to say that it cannot be applied so as to delineate the areas in which Congress intended to make this system of control effective. The fact that many instances may occur where its application may be difficult is merely to emphasize the nature of the administrative problem and the reason for the grant of latitude by the Congress. The difficulty or impossibility of drawing a statutory line is one of the reasons for supplying merely a statutory guide. Cf. *Piedmont & Northern Railway Co.* v. *Interstate Commerce Commission*, 286 U. S. 299, 312,

That guide is sufficiently precise for an intelligent determination of the ultimate questions of fact by experts.

Nor is there an invalid delegation of judicial power. To hold that there was would be to turn back the clock on at least a half century of administrative law. The question of whether or not appellant should be subjected to the regulatory provisions of the Bituminous Coal Act was one which the Congress could decide in the exercise of its powers under the commerce clause. In lieu of making that decision itself, it could bring to its aid the services of an administrative agency. And it could delegate to that agency the determination of the question of fact whether a particular coal producer fell within the Act. *Shields* v. *Utah Idaho Central Railroad Co., supra*, p. 180. The fact that such determination involved an interpretation of the term "bituminous coal" is of no more significance here than was the fact that in the *Shields* case a decision by the Interstate Commerce Commission of what constituted an "interurban" electric railway was necessary for the ultimate finding as to the applicability of the Railway Labor Act to carriers. That problem involves no more than the adequacy of the standard governing the exercise of the delegated authority. Furthermore, on this phase of the case, appellant has received all the judicial review to which it is entitled. As we have seen, it obtained a review under § 6(b) of the Commission's denial of its application for exemption. The functions of the courts cease when it is ascertained that the findings of the Commission meet the statutory test. *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 146.

Appellant contends that the statutory classification of coal into code and non-code classes and the application of the 19½% tax to the latter are improper under the Fifth Amendment. Its objection is not premised on lack of due process. Nor could it be in view of the elaborate machinery and procedure for the Act's enforcement which the Congress has provided. Rather appellant's objection is founded on its claim of discrimination. But the Fifth Amendment, unlike the Fourteenth, has no equal protection clause. *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 584 and cases cited. And there is "no requirement of uniformity in connection with the commerce power." *Currin* v. *Wallace*, *supra*, p. 14. The lack of similarity in treatment of the two classes of coal is an integral and essential feature of this Act. As we have said, it is through that de-

vice that Congress sought to obtain an effective sanction for the Act's enforcement. Coercion is the very essence of any penalty exacted for failure of submission. "It is of the essence of the plenary power conferred" by the commerce clause "that Congress may exercise its discretion in the use of the power." *Currin* v. *Wallace*, *supra*, p. 14. A part of that discretion is the selection of the sanction for the law's enforcement. Discrimination constitutionally may be the price of non-compliance. "Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts." *Sonzinsky* v. *United States*, *supra*, pp. 513-514. And see *Mulford* v. *Smith*, *supra*, p. 48.

III. Appellant contends here, as it did below, that *Sunshine Anthracite Coal Co.* v. *National Bituminous Coal Commission supra*, is not determinative of the present issues since that case did not involve the assessment of taxes and since the Commission had no authority to determine the status of appellant's coal.

These contentions are untenable. In the first place, the Commissioner of Internal Revenue is merely the agency to collect taxes levied under the Act; he is not the administrative agent whom Congress has designated to determine what coal is exempt from the 19½% tax. That function is entrusted to the Commission. By the terms of § 4-A it is the Commission which determines whether an application for exemption should be granted or denied. By the provisions of § 3(b) it is the Commission which certifies to the Commissioner those who are code members and consequently exempt from the 19½% tax. Hence the Commission determines the scope of the provisions of the Act and their applicability to various producers. The Commissioner is given no administrative functions whatsoever except tax collection. In the second place, the underlying issue in each of these two suits is the same. In *Sunshine Anthracite Coal Co.* v. *National Bituminous Coal Commission*, *supra*, the question was whether or not appellant's coal was "bituminous" within the meaning of § 17(b). When that issue was decided adversely to appellant, liability for the 19½% tax followed unless appellant joined the code, in which event it would be entitled to a certificate from the Commission evidencing its tax exemption. In the present suit, appellant is seeking to raise the identical issue, since its purpose is to enjoin collection of the self-same tax.

The result is clear. Where the issues in separate suits are the same, the fact that the parties are not precisely identical is not necessarily fatal. As stated in *Chicago, Rock Island & Pacific Railway Co.* v. *Schendel*, 270 U. S. 611, 620, "Identity of parties is not a mere matter of form, but of substance. Parties nominally the same may be, in legal effect, different, . . . and parties nominally different may be, in legal effect, the same." A judgment is *res judicata* in a second action upon the same claim between the same parties or those in privity with them. *Cromwell* v. *County of Sac*, 94 U. S. 351. There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is *res judicata* in relitigation of the same issue between that party and another officer of the government. See *Tait* v. *Western Maryland Railway Co.*, 289 U. S. 620. The crucial point is whether or not in the earlier litigation the representative of the United States had authority to represent its interests in a final adjudication of the issue in controversy. Cf. *Gunter* v. *Atlantic Coast Line Railroad Co.*, 200 U. S. 273, 284-289. Cases holding that a judgment in a suit against a collector for unlawful exaction is not a bar to a subsequent suit by or against the Commissioner or the United States (*Sage* v. *United States*, 250 U. S. 33; *Bankers Pocahontas Coal Co.* v. *Burnet*, 287 U. S. 308) are not in point, since the suit against the collector is "personal and its incidents, such as the nature of the defenses open and the allowance of interest, are different." *Sage* v. *United States, supra*, p. 37. But here the authority of the Commission is clear. There can be no question that it was authorized to make the determination of the status of appellant's coal under the Act. It represented the United States in that determination and the delegation of that power to the Commission was valid, as we have said. That suit therefore bound the United States, as well as the appellant. Where a suit binds the United States, it binds its subordinate officials. *Tait* v. *Western Maryland Railway Co., supra*. The suggestion that the doctrine of *res judicata* does not apply unless the court rendering the judgment had jurisdiction of the cause is sufficiently answered by *Stoll* v. *Gottlieb*, 305 U. S. 165 and *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66. As held in those cases, in general the principles of *res judicata* apply to questions of jurisdiction as well as to other matters—whether it be jurisdiction of the subject matter or of the parties. Accordingly

the lower court correctly held that it had no jurisdiction to determine whether appellant's coal was "bituminous" as defined in the Act. Furthermore where, as here, Congress has created a special administrative procedure for the determination of the status of persons or companies under a regulatory act and has prescribed a procedure which meets all requirements of due process, that remedy is exclusive. See *Anniston Manufacturing Co.* v. *Davis*, 301 U. S. 337.

The decree below subjected appellant to payment of taxes accrued or assessed against it under § 3(b) after December 4, 1939. To relieve against payment of taxes until final termination of the litigation would be to put a premium on dilatory tactics in a situation where under the authority of *Currin* v. *Wallace*, *Mulford* v. *Smith*, and *United States* v. *Rock Royal Co-operative, Inc.*, *supra*, the subject of the Act was clearly one over which the jurisdiction of Congress was complete.

Affirmed.

Mr. Justice McReynolds is of opinion that the Act under review is beyond any power granted to Congress and that the judgment below should be reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.